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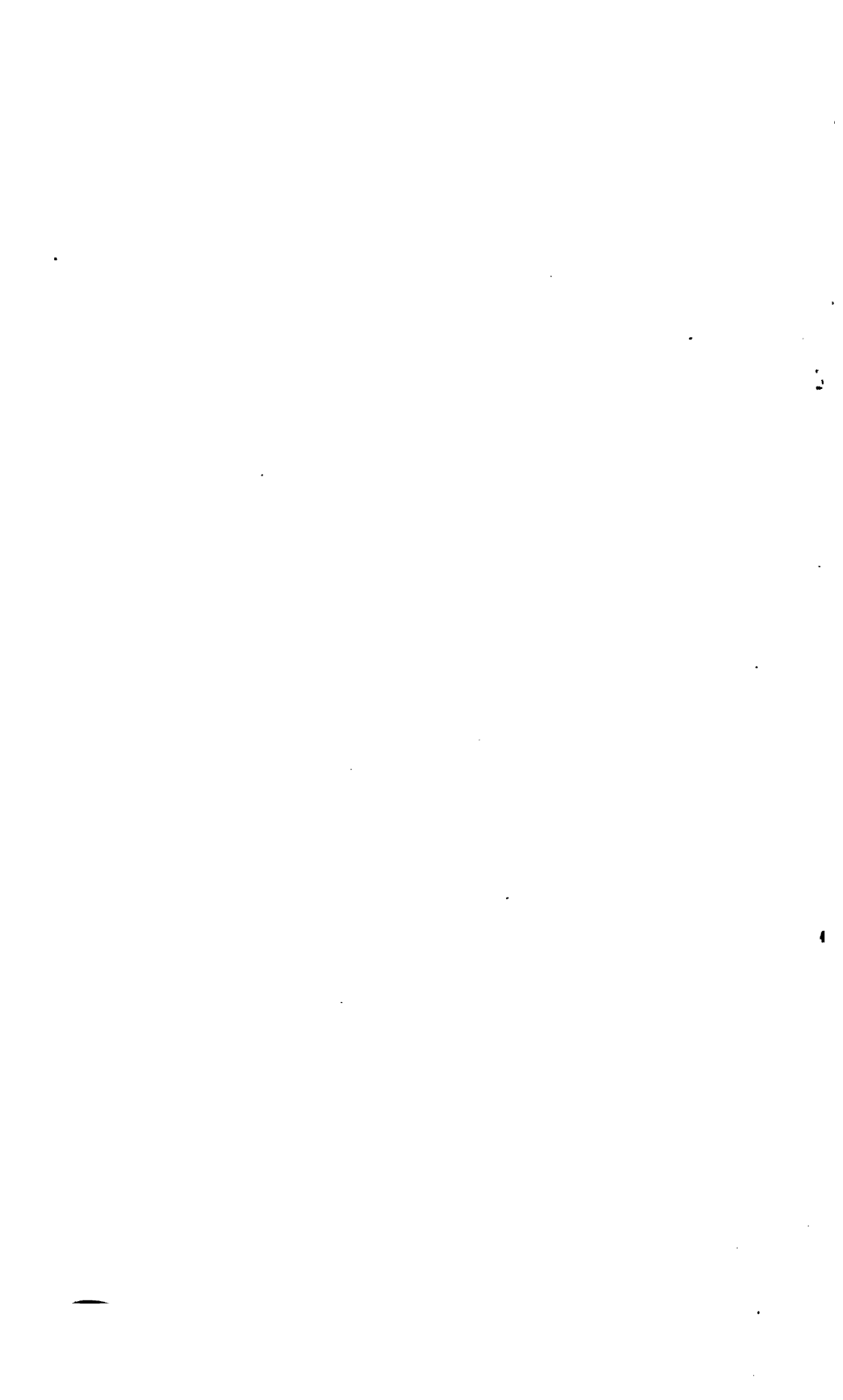
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A
TREATISE
ON THE
Law of Mortgages,

BY THE LATE
John
J. J. POWELL, Esq.

THE SIXTH EDITION,
MUCH ENLARGED AND IMPROVED,
WITH COPIOUS NOTES,
By THOMAS COVENTRY, Esq.
OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. II.

SAMUEL BROOKE, PATER-NOSTER ROW,
LONDON.

1826.

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APPENDIX.

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Treatise on Mortgages.

CHAP. XIV.

OF NOTICE EXPRESS AND IMPLIED (A).

NOTICE [is a creature of equity, and] is of two kinds (B). *Actual notice, what.*
First, actual notice, as where a man is party to a deed, or has notice of it regularly served upon him, or the like.

But the charge of *actual* notice must be founded upon something certain and circumstantial: Thus (a), where one *Vague reports from strangers. no notice.*

(a) *Wildgoose v. Wayland*, Gouldsb. 147, ca. 67, [and *Cornwallis's Ca. Toth.* 254.—Ed.]

(A) This chapter treats, 1st. of constructive notice, arising from vague reports, recitals in, and contents of title-deeds, and generally from whatever puts a party on inquiry, from 561 to 581; 2d. of notice to agents, attorneys, counsel, and scriveners, from 581 to 589; 3d. of the effect of notice to the original mortgagee on his assignee from 589 to 590; 4th. of notice created by the bankrupt laws, from 590 to 596; 5th. of notice created by judgments, from 596 to 611; 6th. of the protection afforded by attendant terms when the party has actual notice of judgments, from 611 to 616; 7th. of notice created by registration, from 616 to 630; 8th. of the compulsory modes of discovering deeds when a purchaser denies notice, from 630 to 635; 9th. of derivative notice, from 635 to 637; 10th. of objections to the case of *Strode v. Blackburn*, from 637 to 653; and, lastly, of the effect of voluntary settlements on purchasers and creditors with and without notice, from thence to the end of the chapter.

Contents of chapter.

(B) Actual and presumptive; but there is no difference as to actual and presumptive notice in its consequences, except perhaps as to guilt: if there were, every kind of constructive notice might then be avoided by employing an agent, *per Lord Northington*, in *Sheldon v. Cox*, 2 Eden, 224. *S. C.* Amb. 626.

No difference between actual and presumptive notice.

came to a vendee, and said to him, "Take heed how you
 "buy such land, for A. hath nothing in that, except upon
 "trust to the use of B.;" and another came to the vendee
 and said to him, "It was not as he was informed, for A.
 "was seised of this land absolutely," by which the vendee
 brought the land; the question was, whether the first caveat
 given to the vendee was a sufficient notice of the trust or not?
 [562] The Lord Keeper said, that it was not; for flying reports
 were many times fables, and not truths; and if this should be
 admitted for a sufficient notice, then the inheritance of every
 man might easily be slandered (c).

*Presumptive
 notice, what.*

Secondly, Presumptive notice, which is a *conclusion* of law
 (where, by the exercise of common diligence, without any ex-
 traordinary precaution, a man cannot but acquire a knowledge
 of a fact) that he has notice thereof, although no *actual* proof
 of notice be exhibited against him (d).

Actual notice.

(C) Actual notice requires little exposition. To render it binding, it must
 be given to the person about to purchase, or to his agent, attorney, or counsel,
 during the pendency of the treaty, or at least before the conveyance or mort-
 gage is executed, or the money actually paid, as distinguished from its being
 secured to be paid. *Hardingham v. Nichols*, 3 Atk. 304. *Maitland v. Wilson*,
 ib. 814. Et vide *S. L. Cautrell v. Mannington*, Finch, 219. In *Fry v. Porter*,
 1 Mod. 300, Hale, C. B. in speaking of the point of notice, said, "Here are
 several circumstances that seem to shew there might be notice, and a *public*
voice in the house, or an *accidental intimation*, &c. may possibly be sufficient
 notice." But in *Butcher v. Stapely*, 1 Vern. 363, where there was no direct
 proof of notice, save that some neighbours in discourse said, that they had
 heard the defendant Butcher had previously sold the estate to the plaintiff,—
 this was held insufficient to affect the purchaser with a knowledge of such
 sale. See also ante, vol. i. p. 438 a, n. (I).

Public rumour.

*Action for
 slander of title
 will lie, when.*

As to slander of the vendor's title, it is observable that an action on the
 case may be maintained against the slanderer, if it can be proved that he
 uttered the report with a malicious intent. *Smith v. Spooner*, 3 Taunt. 246;
 see also *Rowe v. Roach*, 1 Manl. & Selw. 304; and *Pitt v. Donovan*, ib. 639.
 But an action on the case for slander of the vendor's title will not lie against
 a person for giving notice of his claim upon an estate, either by himself or his
 attorney, at a public auction, or to any person about to buy the estate, al-
 though the sale be thereby prevented; nor will the action lie against the
 attorney, although he do not deliver the precise message of his principal,
 provided it be to the same effect. *Hargrave v. Le Breton*, 4 Burr. 2422.

*Tacking mort-
 gage without
 deeds, not no-*

(D) The numerous cases on the doctrine of notice render it difficult to
 define exactly what may be said to amount to constructive notice and what
 not. Lord Hardwicke felt this difficulty in *Amb. 314*, yet some general rule,

Thus (b), where A. a copyholder in fee, mortgaged to J. S. who was admitted by B. the steward of the manor; and afterwards A. made a second mortgage to C. who was also admitted by B.; and then a mortgage to B. who brought in J. S.'s security; it was decreed that B. should not postpone C.; because it is presumed, from the mere act of admission, that a man of ordinary diligence and understanding, being steward of the manor, when C. was admitted, must know or have notice of the *mesne* mortgage to C. (E).

Steward of a manor presumed cognisant of admittances.

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Where a purchaser cannot make out a title but by a deed, which leads him to a fact material to it (c), he will not be

Purchaser presumed to have notice of all facts contained

- (b) *Brothorne v. Bence*, Fitzg. Rep. 118. 2 Eq. Ca. Abr. 615, pl. 11. [acknowledged by Lord Hardwicke in *Mertins v. Jolliffe*, Amb. 314, in which case the same law was laid down.—*Ed.*] *Dunch v. Kent*, 1 Vern. 319.
- (c) *Moore v. Bennett*, 2 Ch. Ca. 246. Giltb. Rep. Eq. 8. 1 Ch. Ca. 291.

he said, must be observed. Lord C. B. Eyre took constructive notice to be no more than evidence of notice, the presumptions of which are so violent that the court will not allow even of its being controverted. If, therefore, continued the learned Baron, a mortgagee have a deed put into his hands which recites another deed, which shews a title in some other person, the court will presume him to have notice, and will not permit any evidence to disprove it. The only reason that could raise in the case before him a notion of constructive notice, was, that the deeds were not forthcoming. But was it possible that this circumstance could, of itself, be notice of the hands into which they were fallen, or the purpose to which they had been applied? At the utmost it could only be a circumstance of evidence, to shew that there was reason for further inquiry; but being unsupported by any other circumstances it proved nothing. *Phomb v. Fluit*, 2 Anstr. 458.

tice of person's title who holds them.

(E) And note, that the entry of the prior incumbrance must, to postpone the steward of a copyhold estate be made during his own time. Where a third mortgage was entered in a wrong book, the fourth mortgagee was hold to have no notice of it; and it was therefore decreed, that the third mortgagee should be postponed until after the fourth was satisfied. *Welman v. Warren*, 2 Eq. Ca. Abr. 595, pl. 9, cited also ante, vol. i. p. 559 a, n. (B) sec. III. The rule *qui prior*, &c. seems to have been disregarded in this instance, unless beyond the point of notice, the third mortgage was defective for want of a correct entry.

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Copyhold mortgage entered in wrong book, no notice.

In *Hansard v. Hardy*, 18 Ves. 462, Sir Wm. Grant seems to have doubted whether a person purchasing a copyhold estate must be presumed to have notice of every thing on the court rolls relative to it. This doubt has since been removed in a late case before the present Vice-Chancellor, who held, that the court rolls are the title-deeds of copyhold estates, and that a pur-

Contents of court rolls notice.

in deeds necessary to his title (v).

deemed a purchaser without notice of that fact, but will be presumed cognizant thereof; for it is deemed gross neglect, that he sought not after it.

Notice of deed, notice of its contents. Notice by exception in deed.

chaser shall be affected with notice of the contents of the court rolls as far back as a search is necessary for the security of the title. *Pearce v. Newlyn*, 3 Madd. Rep. 188. Mr. Sugden objects to this decision but upon dubious grounds. *Sug. Vend. & Pur.* 729. 2 Watk. Cop. 40. 4th edit.

(F) And generally, notice of a deed is notice of the contents of that deed, so far as those contents affect the transaction in which notice of the deed is acquired. *Hamilton v. Royse*, 2 Sch. & Lef. 315. *Parry v. Wright*, 1 Sim. & Stu. 372. 380. Therefore where in a title-deed there was an exception of leases for three lives, which leases contained covenants that the tenants might renew on paying fines of 20l. each, the purchaser was held bound by these covenants; for, by the exception, he had implied notice of them. *Turner v. Florence*, 1 Ch. Ca. 260. In a case which occurred shortly afterwards, a mortgage was excepted in the defendant's conveyance. This conveyance, it was held, the defendant ought to have seen, and that would have led him to the other deeds, in which, pursued from one to another, the whole case might have been discovered. *Bisco v. Banbury*, 1 Ch. Ca. 291. So in another case where a tenant for life granted leases for lives under a power, and bound himself, upon the dropping of a life, to grant a new lease, with the same provision for renewal on the death of any person to be named in any future lease, and afterwards joined in a sale, it was held, that though the power was by this stipulation exceeded, yet if a life dropped during the life-time of the lessor, the purchaser having notice must specifically perform the covenant, by granting a new lease with the same provision. *Taylor v. Stibbert*, 2 Ves. jun. 437; et vide post, 626, in *notis*.

Excess of power binding with notice.

Purchaser of leasehold property, presumed cognizant of contents of leases.

In the same case it was held, that general notice to a purchaser that there are leases, will amount to notice of all their contents. The same law has prevailed from the reign of Charles the Second down to the present period; see *Hall v. Smith*, 14 Ves. 426. *Finch v. Finch*, 15 *ibid.* 43. 350. and *Daniels v. Davison*, 16 *ibid.* 249. *S. C.* 17 *ibid.* 433; and in a late case a person contracting to purchase leasehold property, was held to contract with notice of the clauses contained in the lease; for the treaty of purchase being of leasehold property, the purchaser must be deemed to have general notice of the lease. *Waller v. Maunde*, 1 Jac. & Walk. 181. Similar doctrine has been advanced and acted on by Lord Manners in Ireland, who said, that notice to a purchaser of a lease necessarily implied notice of all the covenants in it, and that if a person be specifically informed that the estate is in lease, he will be bound to know all the contents of the leases, and cannot take upon himself a partial knowledge. *Eyre v. Dolphin*, 2 Ball & Bea. 301.

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Notice of deed, notice of non-performance of covenant contained in it.

By notice of a deed a purchaser will not only be deemed to have notice of its contents, but also of the performance or non-performance of the stipulation and agreements contained in that deed; for having notice of the covenants, he should inquire whether they have been satisfied, or remain to be executed. Thus no claim can be maintained by a husband under his

Thus (d), where B. devised to J. in tail male, and if he died without issue male, to Y. in tail male, but subject to two legacies of 500*l.* and 1000*l.* to the Drapers' Company; and Y. afterwards levied a fine to the use of him and his heirs (on which was five years non-claim), and then granted a rent-charge of 100*l.* *per annum* to S. and mortgaged the premises to L.; the Court held the fine and non-claim was no bar to the legatees; for Y. having no title, but under the will, it was implied notice to all purchasers under him.

Title under will, is notice of legacies given by it.

So (e), where an annuity was granted to A. by the crown, by patent issuable out of the Excise upon special trust, that all such of the creditors of B. as would come in *within a twelve-month*, and accept a share of this annual sum proportionate to their debts, should have the same assigned to them; and A. after the year, assigned part thereof by instruments which purported to be in consideration of debts due and owing from B. but were in truth for A.'s own debts, and the assignees had afterwards assigned the same over to others, who claimed, as purchasers, without notice, for full and valuable consideration. It was held, that although all the creditors of A. did not come in within the year, yet this patent was in trust for them, and not convertible to other purposes; and that those who purchased of the assignees of A. came in under the Letters

Title through letters patent reciting a trust, is notice thereof.

(d) *Drapers' Company v. Yardly, et al.* 2 Vern. 662.

(e) *Dunch v. Kent*, 1 Vern. 260. 319.

marriage agreement, while the terms on his part are not fulfilled. *Mitford v. Mitford*, 9 Ves. 87. and see *Basevi v. Serra*, 14 *ibid.* 313. And therefore a purchaser from him of the subject which was settled on the part of the wife, with notice of the deed, will be bound by the same equity as the husband was subject to. *Harvey v. Ashley*, 2 Sch. & Lef. 328, cited.

But notice of deeds is not notice of the fraudulent intent of those deeds other than as against the persons who are parties to the fraud. *Collett v. Ward*, 7 Vin. Abr. 123.

Notice of deed, not notice of fraud.

Neither will notice of a deed whereby a term is assigned to protect the inheritance from incumbrances generally, be notice of the existence of any incumbrances, yet, if in an assignment it be declared that the term is to attend the inheritance as limited or settled by such a deed, or to protect the uses of such a settlement, that will be notice of the deed or settlement, and consequently of all the uses declared in it; and the purchaser or mortgagee will be bound to find them out at his peril. 1 Coll. Jurid. 337; and see *Willoughby v. Willoughby*, 1 T. R. 763.

Trust of attendant term not notice, except, when.

Patent, in which the trust was mentioned, and ought to have taken notice of it at their peril (g).

Notice to subsequent purchasers.

And subsequent purchasers also are taken to have notice of the contents of a deed or will, if they must claim under it (h).

Conveyance to B., with power for A. to revoke, purchaser from B. has notice of A.'s power.

As if A. makes a conveyance to B. [reserving to himself a] power of revocation by will, and afterwards limits other uses; if B. disposes thereof to a purchaser, a subsequent purchaser is intended to have notice of the will, as well as of the power to revoke; for no title can be made to a purchaser, but by the conveyance which contains the power of revocation (f) (i).

Exception as to dormant trusts.

But in the case of *Bovey v. Smith* (g), a will was not suffered to be set up, as presumptive notice to defeat a transaction, by a trust therein contained, that had laid dormant for many years, after a fine, and where there was *room to presume*, that other trusts were appointed. In that case, B. the mother of A. being in Holland, and having a separate estate about forty years previous to the time of filing the bill, made her will in Dutch, and thereby devised houses to W. her husband's son by a former wife, and to other trustees, in trust for her

(f) *Moore v. Bennett*, 2 Ch. Ca. 246.

(g) 1 Vern. 84. 144. S. C. 2 Ch. Ca. 124.

(G) Of constructive notice by exception in deeds, see the commencement of the preceding note.

(H) But a person affected with notice will have the benefit of the want of notice by intermediate parties, see post, 635.

Case in text explained.

(I) From the report it appears that A. made a conveyance to B., with power of revocation by will, and limited other uses; and it was held, that if A. disposed of the premises to a person by will, another purchaser subsequent (i. e. under the deed) should be intended to have notice of the will, as well as of the power to revoke, for that this was notice at law, on the principle, that where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed conusant thereof; for it is *crassa negligentia* that he sought not after it. This doctrine has been acknowledged in several cases. In *Coppin v. Fernyhough*, post, 575, it was decided that a mortgagee will be bound by that which he might have known by using due diligence; and in *Pearson v. Morgan*, 2 Bro. C. C. 388, it was argued with effect, that if a party be aware of a deed it will be sufficient; whether he knows of the contents of the deed, or not, it will bind him.

four daughters and their children, and such of their children as should be alive at the last, and afterwards declared the trust of all her estate, thereby undisposed of, to be for her and her heirs. The trustees, apprehending that the devise carried the inheritance of the houses to the daughters, sold such inheritance, in 1652, for a good and valuable consideration, and distributed the money, arising from the sale, equally amongst them (h). A. was privy to this conveyance, and made no claim, nor pretended any right to the houses; a fine was levied of them, and five years afterwards W. the trustee, for a full consideration, purchased them back to himself and his heirs (i). Then A. having taken advice on the will, and conceiving the daughters took only an estate for life, exhibited his bill against S. who now stood in the place of W. the trustee, to have an execution of the trust, and the lands decreed to him. Two decrees had been for the plaintiff.

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One point argued was (k), that it was impossible any one should come at the land without having notice of the trust, for they must purchase under the will; and all their title was by the will by which their trust was created, and every man that had notice of the will, must, at his peril; take notice of the operation and construction of the law upon it (κ). But

Title under will, is notice of its contents, and of construction of law thereon. Arg°.

(h) *Bovey v. Smith*, 1 Vern. 84. 144.
S. C. 2 Ch. Ca. 124.

(i) *Ibid.*

(k) *Ibid.*

(K) But though every man will be presumed to be acquainted with the common law of the realm, yet an eminent judge in Chancery has in effect said that he would not presume the subject to know every minute and unsettled doctrine in equity, or bind him to take notice of an equity arising out of the mere construction of words which are uncertain. On a bill filed to alter a settlement made after marriage, pursuant to articles entered into prior to the marriage, against a purchaser for valuable consideration under the settlement, and with notice of the articles by means of their recital in the settlement, Lord Northington observed, that the argument for a construction of the articles whereby the vendor would have had a less estate than he sold to the purchaser, supposed, as against the purchaser, that the subject must know equity as well as law; a position which Lord Northington found no case to warrant, and he would not be the first to make one. A man must indeed, take notice of a deed on which an equity, supported by precedents, (the justice of which every one acknowledged) arose, as in the case of prior incumbrances; but not the mere construction of words, which are uncertain in themselves, and the meaning of which often depends on their locality, *Cord-*

Purchaser not presumed to know doubtful equities.

the Lord Keeper said, this was an application, after one and thirty years possession, to affect an estate with a trust, notwithstanding a release and fine, and *that* upon a supposal that B. had made no other appointment (as she had power to do by the deed), *and* which, after so long possession, it ought rather to be presumed she had done; and also upon a supposal that this was a true copy of the will. This was only a translation; the original was lost; the difference in point of translation between children and issue was niece, and the question

well v. Mackrill, 2 Eden, 347; and this doctrine of Lord Northington's was, in a recent case, cited with approbation by Sir William Grant, M. R., who said there may be such a doubtful equity that a purchaser is not to be taken to know what will be the decision of the court thereon. *Parker v. Brooke*, 9 Ves. 588; and see *Hardy v. Reeves*, 4 ibid. 466, and *Matthews v. Jones*, 2 Anstr. 506.

Whether title depending on settlement, not framed according to rules in equity, can be approved.

Whether a purchaser can be advised to accept a title depending on a settlement made in pursuance of articles, but not framed according to the general rules of equity, is still a matter of doubt, see Fearn's P. W. 515. In a case in Atkyns' Rep. (vol. lii. 293), Lord Hardwicke said, if articles on marriage, are, to settle an estate to A. for life, then to his wife for life, with remainder to the heir male of the body of A., it is taken in equity to be in strict settlement, and to confer on A. an estate for life only, and if the settlement be made after marriage, a court of equity will rectify the settlement by the articles; but this, added his Lordship, was between the parties to the articles and settlement and their representatives and mere volunteers, and had not been carried into execution *against a purchaser*. Vide etiam, *Powell v. Price*, 2 P. Wms. 539; and *Hart v. Middlehurst*, 3 Atk. 377. The same noble Lord in a subsequent case, (*Senhouse v. Earl*, Amb. 353) drew a distinction between ancient and modern articles of this sort, and expressed his opinion to be, that in the case of ancient articles the purchaser should not be disturbed, because modern methods of conveyancing were not to be construed to affect ancient notions of equity; but in case of notice of modern articles, he thought *the court ought to carry them into execution against a purchaser*. And his Lordship might, perhaps, have been induced to this latter conclusion by considering, that if the articles be recited in the settlement the purchaser will have notice of them; and then, according to the doctrine in the text, he will also be deemed to have notice of the construction of equity thereon. But we have seen that Lord Northington's opinion inclined to the side of the purchaser, and therefore nothing conclusive can be affirmed of the question. On the whole, however, it seems clear, that a court of equity will not force a purchaser to take a title depending on a settlement, not framed according to the general rules of equity; although no relief might be granted to his prejudice if he has actually purchased.

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Contra of plain equities.

But notice of deeds, whereon arose a clear equity in favor of a judgment creditor, Lord Redesdale, in a late case, considered to be notice of that equity, notwithstanding the purchaser had not notice of the particular incum-

was, who should suffer? For the defendant was a purchaser, and had paid a full consideration, and was here to be affected with a notional notice only; the plaintiff stood by all the while and was silent, and, at best, passive in the breach of trust. That, therefore, though it was hard to dismiss the bill after two decrees for the plaintiff, yet his Lordship was not satisfied he could decree it for him, and the bill was dismissed (L).

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So, likewise, this rule admits of an exception, in the case of an assignee of the estate of a testator, under an assignment

But notice of will is not notice of its contents, if purchase be of an executor.

brace. Thus A., being seised of Blackacre in fee, and of Whiteacre for life with remainder to his first son in tail, confessed judgments, and settled Blackacre in consideration of a re-settlement, by which he acquired the fee of Whiteacre.—Whiteacre, it was held, was subject to an equity to disencumber Blackacre. And this equity, Lord Redesdale considered binding on the purchaser who had notice of the instruments; for, said his Lordship, the rule is clear, that a purchaser takes, subject to all equities to which the vendor is liable, and of which the purchaser has notice. Here the purchaser took under the settlement, without which he had no title; and taking with notice of the settlement, he had notice of a clear equity against the estate: namely, that whatever incumbrances might affect the estate of Blackacre, were to be made good out of the estate of Whiteacre; and this estate having been given as part of the consideration for the settlement of Blackacre, it was liable to that equity in the hands of the purchaser. It did not follow, that the purchaser had notice of the particular incumbrance, but he had notice that the lands of Blackacre were to be indemnified out of the lands of Whiteacre, against any incumbrance which might affect the same lands. The equity was such, that every purchaser under the settlement must be deemed to have notice of it; for it was a clear rule, that a man could not claim under a deed and avoid the deed, he must submit to the whole, and the purchaser had notice of every thing of which the vendor had notice, so far as concerned that deed. *Hamilton v. Royce*, 2 Sch. & Lef. 315. But Mr. Sugden apprehends, with good reason, that this case carries the rule much further than is warranted by either principle or authority, since it was not a *very obvious* equity, that Whiteacre should disencumber Blackacre of the judgment debts. See ante, vol. i. p. 555, note (Y), for the general grounds whereon the purchaser of Whiteacre was fixed with notice.

(L) This decree of dismissal was reversed in Dom. Proc. 4th March, 1692, xv. Lor. Jo. 275-6. The precise points inducing the reversal do not appear. The principle stated in the margin of the text, seems to be in unison with the prior determinations; and therefore we may conclude, that the judgment of reversal turned upon other points. Lord Redesdale, however, as to those points, treats the case as an existing authority, in *Kennedy v. Daly*, 1 Sch. & Lef. 379. But it is probable that his Lordship was not aware of the reversal.

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Case in text over-ruled, sed secus, of doctrine.

made by the executor (I); for he will not, in favor of creditors or residuary legatees, be presumed to have notice of what is contained in the will of the deviser; because, whoever takes any thing from an executor, must always do it with notice of a will; and therefore, if this doctrine of the will being notice to the assignee was to prevail, no person would dare to purchase, or take an assignment from an executor. Besides, it would be unreasonable that a purchaser should take upon him to make out the account, as to the *quantum* of the debts or assets, when he is not entitled to have the vouchers for that purpose (M).

Same.

[569] Thus, where M. (m), having a mortgage of 3500*l.* made his will in 1712, and devised all his real and personal estate, not by his will otherwise disposed of, to his executors in trust, in the first place by charging, leasing, or selling thereof, or of any part thereof, to raise money to pay his debts; and then to divide what should remain, after payment thereof, in equal proportions between his five children, and appointed his wife, his eldest son I. M. and another person, executors, and died, leaving his widow and five children. After payment of all M.'s debts, a large surplus remained to be divided. I. M. having been appointed, in 1726, receiver of all the rents and profits of the real and personal estates of E. procured a deed to be made, to which the other executors were parties, reciting that there was due on the mortgage 9000*l.* and that the same was the proper money of I. M. and assigning the mortgage, and all due thereon, to B. his heirs and assigns, with

(I) 3 Atk. 236.

(m) *Mead v. Ld. Orrery*, 3 Atk. 236. July 19th, 1745. Et vide *Ewer v. Corbett*, 2 P. Wms. 148. *Burting v. Stenard*, *ibid.* 150. [Et vide on same

subject, *Hardwicke v. Mynd*, 1 Anstr. 109, and *Smith v. Atherly*, 2 Freem. 136, where a purchaser having notice of a will, was decreed to pay the legacies given by it.—Ed.]

Executor's power.

(M) There would, indeed, be great inconvenience in obliging a fair purchaser not colluding with the executor, to take notice of the trusts of the will, when both the law and the testator have concurred in placing the sole right of absolute disposition in such executor. The extent of the executor's power to mortgage or sell the goods and chattels, and terms for years of his testator, has been treated of in a former page and note. See ante, vol. i. p. 101 to 105, and see also the two succeeding notes (N) and (O).

a proviso to be void, if I. M. faithfully accounted with B. for what he should receive from the estate of E.—I. M. afterwards died intestate, without accounting with B. and greatly indebted to the estate of E. A bill was then filed by the plaintiffs, two of the children of M. against the defendants, the representatives of E. to account for what they had received on the mortgage, and to deliver up the deeds and writings relative thereto; and one question was, whether the plaintiffs, as residuary legatees of M. were entitled to be relieved against the assignment of the mortgage, and to have an account; or, whether the representatives of E. were entitled to retain the assignment? And this turned upon the point, whether the assignees of the mortgage were to be considered as having notice of the trust for the benefit of younger children? And the court held, the bare point of notice of the will, in this case, was not sufficient (N).

Mead
v.
Orrery.

So (n), where an executor assigned over a mortgage term of his testator to A. as a satisfaction of a debt due to A. from himself; it was objected, in favor of the daughters of the testator, who were creditors under a marriage settlement, that the assignees took this assignment with notice that it was the

Testator's term assigned to satisfy executor's debt, not of itself notice that term was assets.

(n) *Nugent v. Gifford*, 1 Atk. 463. *Stonard*, 2 P. Wms. 130. [Barnard. 1738. S. C. 2 Ves. 269. *Ever v.* 78. 2 Atk. 41. 3 Atk. 235.—Ed.] *Corbett*, 2 P. Wms. 149. *Burting v.*

(N) This and the next case, are said to depend almost entirely on particular circumstances. See *Taner v. Ivis*, 2 Ves. 469. The broad principles contained in *Mead v. Orrery*, were afterwards disapproved by Lord Kenyon, in *Benny v. Ridgard*, 1 Cox, 145; S. C. 2 Bro. C. C. 433. 4 ibid. 130. 136. 7 Ves. 167, and 17 ibid. 165, cited; and in a prior case, *Crane v. Drake*, 2 Vern. 616, relief had actually been granted to a creditor against a purchaser of part of the testator's assets from an executor, the purchaser having allowed the executor's private debts out of the purchase-money, and having had express notice that the creditor's debt was unpaid, than which, Lord Alvanley said, there could not be a stronger instance of a *devastavit*. *Andrew v. Wrigley*, 4 Bro. C. C. 137. See also the next note. It is laid down by Lord Manners, as now clearly established, that whoever will deal with the executor for the assets of the testator, for a purpose perfectly inconsistent with the due administration of those assets, subjects himself to the consequences of a *devastavit*. *Downes v. Power*, 2 Ball & Bea. 496.

Relief against purchase from executor with notice of debts unpaid.

testamentary assets of the testator. But the court held the alienation to be good (o).

Bona testatoris, not liable to fi. fa. against executor.

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(O) It was, indeed, held by Lord Mansfield, in one case (*Whale v. Booth*, 4 T. R. 625, n. a.) that such was the power of an executor, that although it was apparent on the face of the transaction, that he was about to apply the assets to a purpose foreign to the will, yet a person with that knowledge was justified in dealing with him, upon the supposition that all the debts were paid, or that the testator's estate was, or might be indebted to the executor to that amount. In the case before him, his Lordship accordingly held, that where a creditor under a writ of *fi. fa.* takes in execution *bona propriis* and *bona testatoris* vested in his debtor, knowing them to be such, the execution will be valid, on the ground that the executor joined in the bill of sale, which his Lordship considered tantamount to a conveyance. *Whale v. Booth*, ubi supra. The full extent of this doctrine, Lord Eldon has expressed himself not prepared to follow. *M'Leod v. Drummond*, 14 Ves. 353. S. C. 17 ibid. 170. And in a case decided subsequently to that of *Whale v. Booth*, Lord Kenyon, C. J. and Ashhurst and Grose, Js. against Buller, J. decided that *bona testatoris* could not be taken in execution under a *fi. fa.* in satisfaction of the executor's private debt. *Farr v. Newman*, 4 T. R. 621.

Nugent v. Gifford, re-stated.

The case of *Nugent v. Gifford* is very shortly stated in 1 Atk. 463, from which the text is taken. It appears from the Register's Book, 1738, B. 117, see also 17 Ves. 163, that it was not a specific devise of a term, but that the term formed part of the general assets of the testator. The term was vested in trustees for Sir Richard Billing, who had, by his will, given several specific legacies, and made his natural son executor and residuary legatee. Two years after Sir Richard's death, the son became indebted to one of the trustees of the term, and assigned the same to him as a security for the debt. And the Master of the Rolls, in the case of *Andrew v. Wrigley*, 4 Bro. C. C. 136, said, he could lawfully do so, inasmuch as he was executor; and his Honor admitted, that it was not incumbent on a purchaser from an executor and residuary legatee, to inquire whether the debts were paid; in fact, that mere notice of the will did not oblige the purchaser to inquire after the trusts of the will. But it must be observed, that no case has decided that an executor can sell or mortgage a term specifically devised, for his own debt. Indeed, it appears to have been expressly adjudged, in the case of *Scott v. Tyler*, 2 Dick. 724, that if an executor pledge bonds, specifically bequeathed, for a debt contracted by himself on his own account, after the testator's death, the pawnees will be ordered to deliver them up for the benefit of the specific legatee; although three or four years might have elapsed between the death of the testator and the mortgage transaction.

Result of cases.

The cases on this head have already been investigated, see ante, vol. i. p. 101 to 105. The result of them appears to be, that if a purchaser or mortgagee advances money to an executor (even though the executor be also residuary legatee), for purposes which he knows to be foreign to the will, or if he takes as a security for the executor's private debt part of the testator's assets, he does it at his own risk, and is liable to a suit for relief on a bill filed either by a creditor, or by a pecuniary, specific, or residuary legatee, if

But if such purchaser, from an executor, hath *express* notice of a debt due from the testator still unsatisfied, and there be a contrivance between him and the executor to defeat a just debt, such a transaction will be void against creditors, and the assignee will be held liable.

But purchase of executor with notice of unsatisfied debt void against creditors (n n).

Thus, where H. (o), being indebted to C. on bond, died possessed of a great personal estate, and made W. executor and devisee, who wasted the estate; D. having notice of C.'s debt, bought a leasehold estate of W. by discounting 200*l.* due from H., 550*l.* due from W., and by payment of 150*l.* in money: on a bill filed by C. to have satisfaction for his debt out of the leasehold estate, being part of H.'s assets, the question was, whether this was a good sale to bind a creditor?

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(n n) [Et vide *S. L. Pagett v. Hoskins*, Gilb. Eq. Ca. 113.—*Ed.*]

principle of this case, but doubted whether the facts warranted the ap-

(o) *Crane v. Drake*, 2 Vern. 616. Note, Lord Hardwicke admitted the

plication of it. Vide 2 Ves. 469. (P)

such legatee pursue his remedy within a reasonable time. If the executor be also specific legatee, a mortgage from him of the specific legacy for satisfaction of his private debt will be good, unless it can be shewn that the mortgagee knew there were debts unpaid. *Taylor v. Hawkins*, 8 Ves. 209. See also, ante, vol. i. p. 101 to 105.

(P) This is not exactly correct. Lord Hardwicke said, that his determination in *Nugent v. Gifford*, was grounded on a case in Lord Cowper's time, [*Crane v. Drake*]; but he was not satisfied in *Nugent v. Gifford*, that there was sufficient evidence to come up to the ground of Lord Cowper's determination, the principle of that decree turning on the contrivance which appeared between the executor and the assignee of the mortgage to make a *devastavit*. His Lordship therefore admitted the principle of *Crane v. Drake*, but doubted whether the facts in *Nugent v. Gifford* came up to it.—It is, however, worthy of observation, that as to the principle of fraud and contrivance between the executor and mortgagee, which the court is said to have gone upon in the case of *Crane v. Drake*, no mention of such fraud or collusion is made in the statement of the case in the Register Book, nor is it even charged by the plaintiff in his bill, Reg. Lib. 1707, A. fo. 456. The case, as Lord Hardwicke admits in another place, (*Jacomb v. Harwood*, 2 Ves. 269), is shortly reported in Vernon, and grounded on notice to the purchaser of the particular debt due before his purchase. The law, however, as it now stands, is understood to be different. There must be fraud and collusion, either express or implied, between the mortgagee and executor, over and above actual notice of an unsatisfied debt due, and then, upon the known principle of the court, the purchaser or mortgagee will be bound. See *Whale v. Booth*, ante, p. 569 b, n. (O). 2 Dick. 725, and 1 Burr. 475.

Author's note corrected.

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And it was held it was not, for D. was a party consenting to, and contriving, a *devastavit*.

No preference to creditor becoming mortgagee with notice of trust.

So (p), where the devisee of an estate, in trust for payment of debts, mortgaged the estates to one of the creditors, with notice; and the question was, whether such creditor should retain it by way of security for his own debt, as well as for the old debt, as for the money lately advanced? The Chancellor was of opinion, that, though the general rule was, that a purchaser or mortgagee need not see to the application of the money, where there was no schedule of the debts, yet this rule was never carried so far, as to put it in the power of the devisee in trust, or of the heir at law, who in equity was considered as a trustee, to favor one creditor, which would be the consequence if this was allowed. Such creditor, as to his old debt, could not be put into a better condition by taking the mortgage, but must come in, *pari passu*, with the rest of the creditors; for the estate was a security in the hands of the trustee before, and such mortgage only operated to change the course, which the court would not suffer the trustee to do, considering the giving preference to one creditor, as a fraud, which the court would not allow.

Settlement necessary to vendor's title, purchaser deemed to have notice of it.

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If a deed, by which a prior charge is made upon an estate, be delivered, among other papers relating to the title thereof, to an intended purchaser, and it be proved that a settlement among those writings is necessary to the vendor's title, the vendee will be deemed to have notice of it, and be accountable to the claimants under the settlement for the money he receives on a re-sale (q).

A. purchases with notice of settlement,

Thus, where the plaintiff's father and mother sold an estate to C. and his heirs, which, pursuant to an agreement made on

(p) *Ithell v. Beane*, 1 Ves. 215. [S. C. 1 Dick. 132, et ante, vol. I. p. 223.—Ed.]

Old writings in box, no notice of their contents,

(q) Vide 1 Ves. 435. Letters and writings were in the possession of a party, but in a box supposed to con-

tain nothing but old writings.—Such party held not to have notice of the contents on application for a bill of review, founded on these letters. [Et vide post, 588, n. (d).—Ed.]

their marriage (r), had been settled on the plaintiff's father for life, part on the mother for her jointure, remainder of the whole on the first and other sons in tail male; and the conveyance was made by deed and fine. C. upon his purchase, took in a mortgage term, which was prior to the settlement, entered and afterwards sold the estate to H. and I. It appearing, by the proofs in the cause, that C. the first purchaser, *had notice of the settlement*, and that the same, amongst other writings, were delivered to him, the court decreed, that C. should account for the consideration money, for which he sold the estate, with interest from the decease of the plaintiff's father and mother (a) thereout, discounting what was due on the mortgage made prior to the settlement (s).

whereby vendor was tenant for life, and sells to B. without notice, B. shall hold; but A. shall account for purchase-money with interest (q).

And if it doth not appear, upon the face of such settlement, whether it be voluntary, or on articles before marriage (s), and, in consequence, whether to be considered as binding against creditors or not, that will not alter the case; for the purchaser, having notice of the deed, must, at his peril, purchase, and be bound by the effect of it (r).

Purchaser having notice of settlement, must inquire whether it be voluntary or made in pursuance of articles.

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(r) *Ferrers v. Cherry*, 2 Vern. 344.

(s) *Ibid*.

(Q) So in *Mertins v. Jelliffe*, Amb. 313, it was said, that 'if one affected with notice conveys to another without notice, the assignee, in case he has the legal estate, shall protect himself against prior incumbrances: so vice versa, if an incumbrancer without notice assigns to one who has notice, yet the assignee may protect himself; and the reason is, to prevent a stagnation of property. And in *Lowther v. Carlton*, 2 Atk. 242. S. C. 2 Eq. Ca. Abr. 685, pl. 10. Ca. temp. Talb. 187. Barnard. 358; it was held, that a purchaser with notice himself from a person who bought without notice, may shelter himself under the first purchase, vide etiam Toth. 284. These cases must be considered as over-ruling *Phillips v. Redhill*, 2 Vern. 160, cited. In that case, a tenant for life sold as a tenant in fee, and the very settlement at the time of the purchase was delivered to the purchaser himself; yet the court would not affect the purchaser with the presumptive notice, but dismissed the bill.

Purchaser with notice from one without notice, sheltered under first purchase.

Phillips v. Redhill, over-ruled.

(R) Mother only. Reg. Lib. 1699, A. fol. 553.

(S) And paying the plaintiff his costs, including what costs he might have paid two other defendants. Reg. Lib. 1699, A. fol. 553.

(T) And the reason is, that the titles of other men ought not be shaken by creating a title, vested in a third person, through his own folly. The settlement after marriage did not recite the previous agreement, but it was held, that the party ought to have gone to the wife's relations. See *Hiern v. Mill*,

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Case in text denied to be law. Sed nec nunc.

Contra, if he can deduce title without it.

But, in the last case, the bill was dismissed as to H. and I., who were made defendants, they having pleaded that they were purchasers without notice, and the plaintiff not being able to prove any notice against them, there being no foundation to presume knowledge of the settlement, *C. being able to make a good title without it.*

Notice presumed from words implying existence of prior mortgage.

The adherence to this rule of equity (U) is so strict, that, although there be no positive notice contained in a *purchase deed*, yet if there be words therein, from which the existence of a prior incumbrance must necessarily be implied, it will be sufficient to charge a purchaser. Thus, where a creditor by judgment, in 1698, for 600*l.* came to an account with the cosutor in the year 1707, and settled the remainder due upon the judgment at 420*l.* and took a mortgage in fee for that sum, as a collateral security to the judgment (t); and one S., an attorney, in 1716, took an assignment of this mortgage, in which there was a recital, *that 90*l.* of the consideration of the assignment was then the full worth of the estate.* S. was likewise in possession of another mortgage made in 1688, upon the same estate, as was subject to the judgment in 1698, and the mortgage in 1707. It was resolved S. should not be

(t) *Morrett v. Pasko*, 2 Atk. 54. Vide 1 Atk. 490, 491.

13 Ves. 121. In *Senhouse v. Earl*, Amb. 269, Lord Hardwicke is reported to have said, "As to the case of *Ferrers v. Cherry*, the reporter has mistaken the state of the case. I am inclined to think it was left uncertain on the face of the settlement, whether it was made before marriage or not, I deny the authority of that case." In reference to the uncertainty of the settlement, whether it was voluntary or not, it is stated in Reg. Lib. 1699, A. fol. 553, that the settlement was executed after marriage in pursuance of articles made and executed before marriage, clearly shewing that the settlement was not voluntary; and that his Lordship was mistaken in this point. His Lordship also appears to have recalled his denial of the case, by acknowledging it in *Mertins v. Jolliffe*, Amb. 311, where he must be understood to have said, that although the case of *Ferrers v. Cherry* went a great way, yet it was implied notice. It is also within the spirit and meaning of the rule, for which the learned author adduced it as an example, namely, that where a purchaser cannot make out a title but by a deed, which leads him to another fact, he shall be presumed to be acquainted with that fact. Lord Erskine too cites it as an existing authority in *Hiern v. Mill*, ubi supra.

(U) That notice of a deed leading to a fact, is notice of that fact.

allowed to tack the two mortgages together, so as to defeat the intermediate incumbrances between the years 1688 and 1698; and yet the mortgage in 1707 should have relation back to the judgment in 1698, and by consolidating them together, should entitle S. to receive the sum due upon that judgment, prior to creditors, after the year 1698; but, as to money reported due since the mortgage in 1707, it should be paid only in priority to creditors subsequent to 1707. One ground of which decision was, that the words in the recital of the assignment of the mortgage in 1716, *vis.* "that 90*l.* the consideration money, was the full worth of the estate *at that time,*" naturally implied, that there were intermediate incumbrances, and therefore, to give S. the advantage of tacking both mortgages, would be contrary to his own intention; for, at the time he took the assignment of this *puisne* incumbrance, he must know the estate was worth no more from the very words of the recital (v).

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(V) This rule, that notice of an instrument, leading to a fact, will be constructive notice of the fact, is very extensive. Thus a purchaser may have notice of a will by reason of persons joining in the conveyance, which, without their being devisees, or otherwise, would have been unnecessary, as where the two sisters of the vendor joined in the conveyance to the purchaser. This, said Lord Hardwicke, was the clearest notice of the ancestor's will imaginable, for the concurrence of the two sisters would have been totally unnecessary if the vendor claimed as heir at law. *Burgoyne v. Hatton*, Barn. C. C. 236. But the greatest extent to which this rule of notice has been carried, occurred in the recent case of *Taylor v. Baker*, 1 Dan. Rep. 71; *S. C.* 5 Price, 306, where notice of a judgment against a vendor was deemed sufficient notice to put a purchaser upon making further inquiry; and if he neglects it, and it afterwards appears, that, instead of a judgment, the party has a specific incumbrance on the property, he will be bound by it.

Concurrence of parties in a deed, notice of instruments under which they claim.

The case was this:—On a treaty for sale, Baker, the defendant and purchaser, inquired of the vendor if he had given Taylor, the plaintiff, any security. The reply was, that he had given him a judgment or a warrant of attorney, when, in fact, Taylor had an equitable mortgage, the legal estate for a term of 1000 years being outstanding in one Ewin, a mortgagee. Shortly after this, on the 2d January, 1815, Metcalfe, the purchaser's solicitor, came to Johnson, as attorney for the plaintiff, and asked him what the nature of the plaintiff's security was; upon which Johnson produced the deeds of conveyance to the plaintiff, and so gave full notice of the whole state of the incumbrance to the purchaser's solicitor before the conveyance was executed, which was not till the 10th of the same month, when Baker took a conveyance from the vendor, and an assignment of the term from Ewin, the mortgagee, to a trustee of his own nomination. All the transactions therefore took place

Notice of incumbrance is notice of the existing incumbrance, though it be of another description.

Mortgagee of lease which recited surrender of former lease, which recited surrender of another lease, in which the then lessee was styled devisee of J. C., held to have notice of will and settlement recited in last lease, and compelled to convey estate according to uses thereof.

And where I. C., being seised of several freehold estates, had settled the same to certain uses, and being possessed of a prebendary lease for twenty-one years, which was usually renewed every seven years, and which he held at the time of making his will, after charging the same, together with other freehold estates, with an annuity, devised it to the same uses, intents, and purposes, as were declared in the settlement of the freehold estates first mentioned^(u). Then the testator died. The leasehold estate was several times renewed by the several persons in possession, and in one of the renewals, the then lessee was styled devisee of I. C. Afterwards there were several other renewals. Then the estate was mortgaged by

(u) *Coppin v. Fernyhough*, 2 Bro. C. C. 291.

after full and complete notice of the plaintiff's incumbrance. Baker having procured the assignment of the mortgage to a trustee for himself, he unquestionably gained a right to make use of it in the same way as any other mortgagee in a similar situation might have done. Under these circumstances the plaintiff filed his bill for an account and redemption against Baker, and said, "you are precisely in the same situation as Ewin." But Baker replied, "I have the legal estate; and, having that, I have ousted Taylor of the premises: he cannot have the estate without paying me every thing that is due. I had an equitable estate; and the plaintiff having only the same interest, we were in *pari conditione*, and whichever could get the legal estate took the benefit of it. It was the *tabulam in naufragio*."

Between equal equities, one obtaining legal estate without notice preferred.

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The Lord Chief Baron Richards observed, that in general the rule of court was, that if there be two persons in similar situations, with equal equity, and one procures the legal estate, the legal estate shall prevail: but then they must have equal equity. If Baker had, *bonâ fide*, advanced money to the vendor without knowing that any thing was due to Taylor, he would have had an equal right with Taylor: but if he knew of Taylor's interest, he could not, by getting in the legal estate, exclude him from the benefit he had before. The only question then was, whether Baker had notice of Taylor's claim or not? His Lordship thought he had; for if a person purchasing an estate were to inquire whether there are any incumbrances on it, and is told there is a mortgage, that would be clear notice of the mortgage. Where then was the difference? The defendant had notice that there was a judgment: that surely was sufficient to call upon him to make further inquiry; and the defendant's solicitor certainly did act under that impression. Was not a judgment a lien upon the land? and could a purchaser, having notice of such a lien, say, with any fairness, that he had no notice of any claim on the estate? It seemed, therefore, to the Lord Chief Baron, that the purchaser had notice of a security; and having such notice, he was bound to make further inquiries, and thereupon his Lordship decreed for the plaintiff.

one of the claimants, under the settlement and will, as his own property. And the question was, whether the mortgagee, who had no other notice of any defect in his title, except that the lease, which was assigned to him, recited among the considerations the surrender of the former lease, which recited the surrender of the other, in which the lessee for the time being was styled devisee of I. C., had such notice thereby as would render the estates in his hands liable to the trusts of the settlement. And it was held, that the mortgagee was affected with notice of the settlement, and that he must convey the estate according to the uses, &c. limited and declared therein (w).

But a suspicion from deeds, in which a prior incumbrance is recited, being in the hands of a family, is not a sufficient evidence of notice to affect them, if the claim under a settlement, which might be made by an *apparent owner* without looking into the deeds; for in such case something farther must be shewn. So, where there were father, mother, and son, and the father settled an estate on himself for life, then to his wife for her jointure, and, on her death, to the sons of the marriage (x); under which settlement the wife and son insisted on being purchasers for a valuable consideration, without notice. Notice of a prior charge was proved against the father by recitals on his own conveyances, and in part by his own admission; but, as to the wife and son, there was no proof, but from the deeds being in the hands of the family, which was held not sufficient to affect them with notice; be-

Notice to tenant for life, not notice to those in remainder, though it be father, mother, and son (x).
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(x) *Whitfield v. Fausset*, 1 Ves. 347.

(W) From this case we deduce the principle, that a lease in consideration of the surrender of a former lease, is implied notice of the lease, and leads the purchaser to an investigation of the intermediate title, and consequently the examination of all prior leases and mesne assignments. This doctrine proceeds on the ground, that whoever has a lease has an interest in the renewal; and when an additional term has been granted, the old terms may be said to be still in existence. Per Lord Manners, in *Winslowe v. Tighe*, 2 Ball & Bea. 205. Et vide *Stubbs v. Roth*, *ibid.* *Parry v. Wright*, 1 Sim. & Stu. 372.

(X) Lord Talbot, however, held, that the issue were to be deemed affected with notice to their father and mother and trustees, *Collett v. Ward*, 7 Vin. Abr. 123; and Sir William Grant is said to have been of opinion, that notice to the tenant for life will be good notice to those in remainder. *Sed qu. de hoc.*

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continued.

Renewed leases, are notice of leases surrendered, and of recitals therein.

Whether notice to tenant for life extends to remainder-man?

cause such settlement might have been made by an *apparent owner* without the deeds having been looked into.

Whatever puts a party on inquiry, is good notice in equity (y).

And whatever is sufficient to put the party charged with notice upon an inquiry, is good notice in equity (y): thus,

(y) *Smith v. Low*, 1 Atk. 489.

Notice of tenant's possession is notice of his interest.

(Y) This is the general rule. The preceding note but one will furnish an apt example of the manner of its application. It was acknowledged in *Daniels v. Davison*, 16 Ves. 249. S. C. 17 ib. 433, and has been uniformly acted on as the very basis of constructive notice. In *Douglass v. Whitrong*, cited 16 Ves. 254, it was settled, that if a person, purchasing where there is a tenant, neglects to inquire into the nature of the estate and title of such tenant, he must take subject to such rights as the tenant may have. The same law was acknowledged by Lord Redesdale, in the House of Lords, in *Moore v. Blake*, 4 Dow. P. Rep. 245. On this principle it was determined in *Daniels v. Davison*, *ubi supra*, that the possession of the tenant will be notice to a purchaser of the actual interest he may have either as tenant or otherwise; and therefore where there was a lessee, who, by his original agreement, had an option of purchasing the estate at certain periods, and the tenant, before his death, declared his intention of purchasing the estate, he was held to be the owner of the property *ab initio* from the date of the lease for the benefit of his heir at law, the price to be paid by his executor; and specific performance was consequently decreed in favor of the tenant against the seller and second purchaser, who knew of the possession of such tenant,—the seller and second purchaser being left to settle their rights between themselves. 17 Ves. 433. So, where a person in 1781 agreed to take a lease for lives of a farm, and entered into possession, and he and his representatives continued in possession thereunder till 1805, and it was proved that the purchaser was aware of the occupation, he was held to have notice, and to be bound by the agreement. *Powell v. Dillon*, 2 Ball & Bea. 416.

Whether that interest arises under an agreement to purchase or take a lease.

Or under a lease or tenancy from year to year.

In *Taylor v. Stibbert*, 2 Ves. jun. 440, Lord Rosslyn states the rule thus:—“I have no difficulty to lay down, and am well warranted by authority, and strongly founded in reason, that whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates those tenants have. It has been determined, that a purchaser being told particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking for granted it was only from year to year, was bound by the lease that tenant had; which was a surprise upon him. That was rightly determined; for it was sufficient to put the purchaser upon inquiry, that he was informed the estate was not in the actual possession of the person with whom he contracted; that he could not transfer the ownership and possession at the same time; and that there were interests, as to the extent and terms of which it was his duty to inquire.” So, in a later case, it was held, that the possession of a tenant will be notice to a purchaser of the whole actual interest he may have in the estate; and, consequently, of a

Or under an agreement posterior to his lease.

where infants, entitled to an estate, found a person in possession then, and received rent of him for ten years after they

right to the timber on the estate, although such right accrued by a title posterior to that on which his possession was grounded. *Allen v. Anthony*, 1 Meriv. 282.

The conclusion from these cases is, that a purchaser cannot be advised to complete a contract for an estate not in the seller's own occupation, without a communication with the tenants, to ascertain what their interests really are. *Practice.*

But although notice of a tenancy, will be constructive notice of the title of the tenant, yet it seems that if the tenant, in conjunction with his landlord, create any equitable claim on the legal estate of the lease in favor of a third person, the purchaser will not be bound to notice it from the mere circumstance of the tenant's possession. The case supporting this position is that of *Crofton v. Ormsby*, 2 Sch. & Lef. 583, before Lord Redesdale, which requires to be shortly stated to enable the reader to apply his Lordship's observations to the point proposed. One Crofton, a lessee for lives, on his marriage, procured a promise from his landlord (by letter) to change the then only existing life of his lease for the life of his intended wife. A settlement was then made, whereby this equitable interest was settled on his wife for her life provided she survived him. The marriage was had without any actual alteration having taken place; and afterwards the landlord dying, his property was sold, and the premises comprised in the lease purchased by the defendant, with divers other leases. In the rent-roll delivered to the defendant, it was stated in a column opposite to the name of the farm in question, that the legal subsisting lease was made in 1734, for three lives, of which, one only, A. was in existence, and in another column of observations these words were added, "The present Earl of Arran (the landlord) exchanged the life of A. for the life of E. C. wife to said Crofton (the lessee) on the 8th of August, 1782." On this evidence it was decreed, that the purchaser had sufficient notice of the promise by the Earl of Arran, to change the lives as above stated, and he was consequently decreed to perform the agreement in specie. In the course of his judgment, Lord Redesdale observed:—"If one purchases, knowing that another person is in possession, he must know that the person so in possession has some interest, and he is bound to inquire what is his interest: if upon such inquiry, he is deceived (as, for instance, if in the present case the lease of 1734, had been produced to the purchaser, as that under which the lessee held), I do not think the purchaser would be bound by any equitable contract, unless the terms of the actual conveyance had qualified that; and the reason is, that the ordinary means whereby the term of an estate is ascertained, is by production of the counterpart of the tenant's leases, and here the counterpart of the leases would have warranted the allegation, and it would be to much to expect the purchaser to go to inquire of each of the tenants. Then, it is said, there were laches on the part of Crofton, and unquestionably to a certain extent there were. If it is to be said, that it is laches to rest upon an equitable agreement, this is laches, but still this would not affect Mrs. Crofton; for I must consider Lord Arran as a party to the

Tenant's possession not notice of equitable contract, if not produced on inquiry,

No laches in neglecting to obtain legal title.

came of age, that was held to be a sufficient notice of a lease made by their guardians, and a ground from whence to con-

settlement, because the intention authorized Mr. Crofton to make the settlement. But what is the laches? Is it like the laches in *Wingfield v. Whaley*, 2 Bro. P. C. 447. *Milward v. Earl Thanet*, 5 Ves. 720, n. or the other cases? No: these were cases of a different description. The whole laches here consists in the not clothing an equitable estate with a legal title, and that by a party in possession. Now I do not conceive that this is that species of laches which will prevail against the equitable title; if I should hold it so, it would tend to overset a great deal of property in this country, where parties often continue to hold under an equitable contract for forty or fifty years, without clothing it with the legal estate. I conceive, therefore, that possession having gone with the contract, there is no room for the objection."

Notice of tenancy not notice of lessor's title.

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Notice of a tenancy will not affect a purchaser with constructive notice of the lessor's title. Thus, if trustees under a charity make an improvident lease, a purchaser from the lessee, though he must be understood at least to know that the lessors were trustees for a charity, yet the court will not go the length to presume that he knew the lease was bad; that depending on a number of circumstances *dehors* the lease, Lord Eldon said, though the purchaser of a lease had never been considered as a purchaser for valuable consideration without notice, to the extent of not being bound to know from whom the lessor derived his title, he (Lord Eldon) was not aware of any case that had gone the length, that the purchaser was to take notice of all those circumstances, under which the lessor derived that title. *Attorney-General v. Buckhouse*, 17 Ves. 293. That an invalid lease at law can be made good in equity against a purchaser, by notice to him of the existence of such intended lease, is certainly not a proposition which Lord Eldon meant to be deduced from his observations, for such a lease might easily be set aside at law by action of ejectment against the wrongful tenant in possession. *Doe v. Luffkin*, 4 East, 221. His Lordship is not speaking of a purchaser of the inheritance with notice of a lease, but of an assignment from the lessee himself, who gives notice to the purchaser that his lessors are trustees under a charity.

Same.

As another instance of the lastly-mentioned rule, that notice of a tenancy will not affect a purchaser with constructive notice of the lessor's title, if a person equitably entitled to an estate let it to a tenant who takes possession, and then the person having the legal estate, sells to a person who purchases *bonâ fide* and without notice of the equitable claim, the purchaser must hold against the equitable owner, although he had notice of the tenant being in possession. Sug. Ven. & Pur. 651, 5th edit.

Notice inferred from legal estate and deeds outstanding.

On the principle that whatever puts a party on inquiry, is good notice in equity, it is further observable, that if a person be apprised that the legal estate is in a third person at the time he purchases, he will be bound to take notice of the trusts with which that legal estate is clothed. *Axon v. Freeman*, 137, pl. 171. So notice that the title-deeds are in another man's possession, may, under strong circumstances, be held to be notice of an equitable claim which that person has on the estate, and as a security for which he holds the deeds. *Hiera v. Mill*, 13 Ves. 114. As to equitable claims, where one was

clude that they had ratified it; for, finding a person upon their estate, was sufficient to put them upon inquiry.

seised of an estate, subject to several equitable incumbrances, and sold it to a purchaser, conveying the legal estate to him free from incumbrances, except some of the equitable incumbrances which were later in date than the others, the purchaser, who had no notice of the other incumbrances, was held a trustee for the excepted creditors only, and they were preferred to the other creditors. *Ingram v. Pelham*, Amb. 153. And cases have occurred, in reference to the covenant against incumbrances, where it has been doubted whether such a covenant would extend to protect a purchaser, against incumbrances, of which he had express notice; and see *Ogilvie v. Foljambe*, 3 Meriv. 65.

The inadequacy of the purchase-money, in comparison with the real value of the estate, does also, it is said, furnish ground to presume that the purchaser is aware that he is contracting for an estate which is subject to some incumbrance; and if an incumbrance exists, he will be bound by it accordingly. *Stockdale v. South Sea Co.* Barn. C. C. 367; et vide ante, 574, in the text. A purchaser, with notice, is bound in all respects as the vendor, 2 Ves. jun. 437; and *Coppin v. Fernyhough*, 2 Bro. C. C. 291, shews, that a mortgagee with notice of an equitable claim, cannot protect himself as a purchaser, or be distinguished from the mortgagor.

A purchaser will not be affected by the vendor's non-possession for many years; for whether in or out of possession, his title will remain the same; unless it be so long neglected as to be barred by the statute of Limitations. Possession is not even *prima facie* evidence of title, because it may either be by sufferance or trespass. A purchaser, therefore, is bound to inquire into a title, though the party of whom he purchases be in actual possession, and if, upon being asked for the deeds, the vendor acknowledges that he has them not, the purchaser must make further inquiry. See *Oswith v. Plumer*, 3 Bac. Abr. 644, ante, vol. i. 528; and *Hiera v. Mill*, 13 Ves. 122.

Where a covenant was introduced into a settlement, that one of the parties, who, at the time of the execution of the settlement, was a minor, should convey when of age, it was argued, that such covenant imported notice that the minor had an interest in the estate, and that the parties should have inquired what that interest was, which inquiry would have led them to a knowledge of the previous articles; in pursuance of which the settlement was made, which articles would have disclosed to them the incumbrancer's title. This, Lord Northington said, might have had some colour, if the minor had been of maturity; but it was a covenant necessary to make him a party to the settlement, therefore his Lordship thought that circumstance did not prove notice. *Howarth v. Deem*, 1 Eden, 355.

In a recent case, notice of the plaintiff's title was attempted to be proved on the defendants by certain collateral matters, from which it was contended a knowledge of it might have been derived. One C. had effected an insurance of the chapel and other buildings in dispute, which purported to be made in the name of himself, "and the other proprietors." The policy was assigned to the defendant's trustee, and was mentioned in an assignment of the equity

Inadequacy of consideration notice, when.

Mortgages with notice in same situation as mortgagor.

Notice arising from possession, and non-possession of vendor.

Covenant that minor shall execute when of
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age, not notice that he has an interest.

Notice not implied against a person from instruments leading to facts, if not his duty to inquire after them.

Incumbent on purchaser of remainder-man to see that prior entail is spent.

So, where a defendant claims under a conveyance made by a remainder-man (*z*), where there is an estate tail prior to the estate of him under whom he purchased, it is incumbent on him to see if that estate be spent; for, if it be not, he will be considered as having notice thereof.

Notice denied must be of plaintiff's title, not of knowledge of person to claim under it.

And it will not be a sufficient denial for the purchaser to plead, that at the time of the purchase, the vendor made affidavit that tenant in tail was dead without issue, and *therefore* that he is a purchaser without notice; for, this is a denial only of the knowledge of there being a tenant *in esse*, not of knowledge of his title, which a purchaser is bound to take notice of (*xx*).

(*z*) *Kelsal v. Bennett*, 1 Atk. 522.

(*zz*) *Kelsal v. Bennett*, 1 Atk. 522.

of redemption to one Goodacre and Co. These parties, it was said, must be presumed to have inspected the policy. If they did, they must have seen that there were "other proprietors;" and by proper inquiries they might have learned that the plaintiffs were those other proprietors. But Sir Wm. Grant said, he had no conception that this could be deemed that clear proof of actual notice, which the cases profess to require: especially as there was in the answers an express denial of any notice whatever. But as against Goodacre and Co. it was said, that there was farther evidence of notice, which was received, not before they took and registered the assignment, but before they had advanced the whole money they had agreed to lend. It was indeed contended, that for the subsequent advances they were not entitled to the benefit of their security as against the plaintiffs. This was founded on a passage in the answer of a Mr. Buzzard, one of the partners in the house of Goodacre and Co., who said, that in September, 1812, he had received an instrument, from which instrument notice was inferred, "Now, continued Sir William Grant, here is a paper, transmitted to Mr. Buzzard, not by way of claim or notice to him from any of the plaintiffs, not for his own information on any subject, not as a ground on which he was to do any act, but merely for the purpose of communication to a person, who was expected to become a subscriber to the chapel; and to whom it was thought expedient to shew the nature of the security, which the subscribers were to have for their money. There was nothing in the circumstances or the purpose of the communication, that was likely to induce him, still less that made it a duty incumbent upon him to pay any particular or minute attention to the contents of the paper; and he swore that he did not pay any attention to them;" this, therefore, Sir W. Grant held to be no proof of notice whatever. *Wyatt v. Barwell*, 19 Ves. 440.

Notice, question for jury.

Lastly, *note*, that reasonable notice is a question for a jury. *Peacock v. Peacock*, 16 Ves. 59. And for a further distinction on this rule, see ante, vol. i. page 554, n. (Y).

But if, *from recital*, a title to lands be deduced *by the first* vendor, *that* will not be *sufficient*, if such estate be not paid for, to affect a subsequent purchaser for a valuable consideration with notice thereof (a); for *that* does not shew that it was not paid for, or lead to an inquiry whether it was paid for or not (z).

Title deduced by recital not notice to subsequent purchaser that his vendor's purchase-money is unpaid.

If a deed, or other paper which is deemed constructive notice of a prior incumbrance, be found in the custody of any one, it will be no objection to the charge of notice, that it does not appear when it came there (b); for if a person admits, or a deed be proved to be in his custody, whether as representative of another or otherwise, it will be incumbent upon *him* to shew when it came there, for it is impossible for the other side to shew it.

Person having a paper which is constructive notice, must say when he came by it.

And the fact of presumptive notice, founded upon the party having had a deed, whereby a title in another, elder than his own, is created, in his possession, may be controuled, by shewing that although the party had notice of the deed, yet he was not aware of its effect, but was induced, upon investigation of lawyers, to draw a different conclusion on the

Party may show that his attorney misinformed him of the effect of a deed.

(a) Bro. C. C. 302. per Com. [See (b) 2 Ves. 486. [Et vide 1b. 392. infra, 630, 1, 2, 3.—Ed.] —Ed.]

(Z) The brevity of this paragraph destroys its perspicuity. Lord Loughborough, Com. in *Cator v. Bolingbroke*, 1 Bro. C. C. 302, observed, that the principle, in case of purchase-money remaining unpaid, was the same as in the case of an exchange; the estate remained subject to the vendor's right to his money against the heir, if the purchaser were dead, or against a third person to whom such purchaser had made a legal conveyance: but if that person had paid the value of the estate, it became a question whether it was with or without notice of the first vendor's claim; and if, by recital, the title were deduced from the first vendor, still that would not be sufficient to affect the second purchaser, for that did not shew that the estate was not paid for. The cause was afterwards re-heard before Lord Thurlow, who affirmed the decree, observing, that the Lords Commissioners did not say the money might be pursued;—if they had, his Lordship thought he should have differed from them. 2 Bro. C. C. 289. As to the vendor's taking a security for the purchase-money remaining unpaid, see *Nairn v. Prowse*, 6 Ves. 752.

Purchase-money unpaid, not to be inferred by recital of title.

Mortgages obtaining deed of settlement from tenant for life (his mortgagor) protected.

effect of the instrument from that which in reality it produced (A). Thus, where tenant for life, remainder to his first son, mortgaged for 1500*l.* (c), and the deed of settlement was produced and seen by the purchaser, who lent the money notwithstanding; being advised that the tenant for life, not having then any son born, could destroy the contingent remainders, though, in truth, there was a son born five days before the lending of the money, yet the mortgagee having had no notice thereof, and having got the deed of settlement, the court would not relieve against him by compelling him to produce it (B).

(c) *Brampton v. Barker*, 2 Vern. 15, cited 1 Eq. Ca. Abr. 333, pl. 3, and post, 646.

Doctrine of text questioned.

(A) This is a very questionable position, and not at all warranted by the case cited in support of it. To say that a party who has notice of a deed may shew that he is not aware of its effect, is in fact to affirm that notice of a deed is not notice of its contents, which is contrary to rules previously adduced. The case cited is considered in the next note as over-ruled.

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Brampton v. Barker considered over-ruled.

(B) It is apprehended that a court of equity would not now assist a mortgagee in thus uniting with the tenant for life in destroying or encumbering contingent remainders. As establishing a general principle, this case of *Brampton v. Barker* must be considered as over-ruled by that of *Kelsal v. Bennett*, cited ante, 579, where A. devised the estate in question to B. in tail, with remainder to C. in fee; and the bill was brought by the heir of the body of B. for deeds and writings and possession. The defendant's plea was, that he was a purchaser for valuable consideration from C., and had no notice of the plaintiff's title; but this plea was over-ruled, on the ground, that where a defendant claims under a conveyance, in which there is an estate tail prior to the estate under which he purchases, it is incumbent on him to see if that estate is spent. In *Brampton v. Barker* the mortgage deed recited the settlement, in which it appeared that the mortgagor was merely tenant for life, with contingent remainder to his son. It was therefore imperative on the mortgagee to have seen, that the contingent remainder was actually destroyed, and the estate for life merged in the reversion in fee, and that the reversion in fee was vested in the *quondam* tenant for life, before he advanced his money. As against the mortgagor, the mortgagee might perhaps have had remedy over. It was a fraud in him to conceal the circumstance of his having a son born five days previously to the mortgage; for he thereby enticed the mortgagee into a bargain, which, if he had been informed of the actual state of the facts, he would certainly have declined. Mr. Sngden also considers the case of *Brampton v. Barker* as over-ruled, see V. & P. p. 665, 5th edition.

Notice to a man's scrivener, attorney, agent, or counsel, is sufficient notice to the party himself (d) (c). *Notice to agent binding on principal.*

And therefore, where M. suffered a recovery of an estate in A., and then settled all his lands in A. upon his family (e); afterwards a tenement in A. of which he had the reversion after an estate for life, descending to him in tail by the death of the tenant for life, he suffered a recovery of it, and devised it to his younger son in fee. Then M. mortgaged it, together with 200*l.* that he had a power to charge on the settled estate, for securing 200*l.* which he borrowed, and then he died. The mortgagee applied to the elder son for the money, who at first disputed the payment, but afterwards submitted thereto, upon the mortgagee's assigning to him the tenement so charged, that he might stand in the mortgagee's place; to which the mortgagee agreed, upon his covenanting to indemnify him for making this assignment, he having heard of the younger son's title. The eldest son then mortgaged the tenement to B., who had advanced the money to pay off the former mortgage. It was sworn, that B.'s agent was present at the execution of the assignment when the indemnity was insisted upon; and the agent deposed, that the deeds were laid before counsel, who made objections about the plaintiff's title. The assignment itself was strong evidence of notice, for it had not the face of an assignment to a person having the equity of redemption, but was made subject to the equity of redemption; and was plainly meant to keep the mortgage on foot, if any other person had the equity of redemption, as the covenant to indemnify also supposed. One question was (f), whether the last mort-

Notice to agent to take care, enough to make principal inquire into title, and he cannot protect himself by legal estate.

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(d) *Merry v. Abney*, 1 Ch. Ca. 38. 1 Ves. 69. 2 *ibid.* 477. 3 Ch. Ca. 110. *Ashley v. Bailie*, 2 Ves. 368. *Hothwell v. Abney*, Nels. Ch. Rep. 59, et vide *Bishop of Winchester v. Fournier*, 2 Ves. 445.—*Note*, Lord Hardwicke said, it would be too much to affect a party with notice, from the

circumstance of the attorney having overlooked a deed, intermixed with a great number of old family deeds, 1 Ves. 435. *N. B.* The question was to a bill of review. [See ante, 571, 572, n. (g).—*Ed.*]

(e) *Maddox v. Maddox*, 1 Ves. 61.

(f) 2 Ves. 485.

No notice of deed overlooked.

(C) The latter cases on this head have, for the most part, been collected in a former note, see ante, vol. i. 554, 5, n. (Y).

gagee had not notice of the youngest son's title? And the court held, here was such evidence of general notice, either to the party himself, *or to his agent*, to take care, as made it necessary for him to inquire into the title, which not having done, he must take the consequence (D).

Third mortgagees buying first mortgage, not preferred to second, the three securities being prepared by scriveners who were partners.

So, where E. mortgaged his manor of B. to M., and his heirs, for securing 3000*l.* (g); afterwards G., the father of the plaintiff B., lent E. 2800*l.* and, by deed, reciting M.'s mortgage, he declared, that after the 3000*l.* and interest paid, the estate should stand charged, and be a security for G.'s money. M. *was no party to this deed.* Afterwards H., one of the defendants, lent E. 400*l.* and obtained a deed from E. and M., that after M. was paid, the estate should, in the next place, stand charged with the 400*l.* and in like manner for C., and several other defendants. All the securities were transacted at the shop of W. and Y., scriveners, who were witnesses, engrossed the writings, and were in the nature of agents to all the several lenders. The question was, whether B. should be paid next after M., or whether H. and the others should be preferred, because they had got a declaration both from E. and M., who, by that means, became a trustee for them, after his own money paid? And it was decreed, that B. should be paid next to M., and so on, as the mortgagees stood in order of time; for notice to the agent was good notice to the party, and consequently, those that lent last, must come last, having notice of what was before lent.

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Notice to attorney's agent in London notice to principal.

And although a country attorney acts by an agent in causes in London, yet he will be considered as the solicitor for his

(g) *Brotherton v. Hatt*, 2 Vern. 574.

Mortgagee bound by will, his attorney having recited it in mortgage.

(D) The same principle seems to have been acted on in *Newstead v. Searles*, 1 Atk. 267, where upon a mortgage to one Pindar, by the contrivance of some country attorney, Elizabeth Searles and her husband levied a fine, and in the deed to lead the uses there was a complete recital of the will under which the wife claimed, and of her marriage settlement, in so ample a manner, that the will and settlement must necessarily have been laid before the attorney; and it was held, that the mortgagee had consequently full notice of it through his agent.

clients, though he resides in the country, and what is known to him will be constructive notice to them (*h*).

And the law will be the same, though one person be agent for both parties, nor is it material, on whose recommendation or advice the agent was employed (*i*). For, where a woman pleaded that the agent, who made her marriage settlement, was not employed for her but as an attorney for her intended husband, admitting that he might prepare the articles, she having a confidence in him from her husband's recommendation; so that her general denial was to be taken with this admission, which left it open to the proof of notice to her agent, although personal notice was denied; it was objected, that notice to her husband's attorney or agent would not affect her; but it was held, that she had sufficiently admitted that he was agent or attorney for her, by her consenting to his preparing articles, from a confidence in her husband; and that it was no matter what ground she went upon, or upon whose recommendation or advice, it being the same thing to the plaintiffs; for it would be very inconvenient and mischievous to take into consideration from whence an agency arose. Nor was it material, that the husband also employed him, there being several cases where, in marriage settlements, the same counsel or attorney was employed on both sides, who would be both affected with notice to him, it being the same to a person having an equity.

If agent be employed on both sides, both parties affected with notice to him.

Not material on whose advice employed.

The same principle was laid down by Lord Northington in the case of *Sheldon v. Cox* and others,

Nor his acting in different capacities, nor his being owner of estate.

In this case A. and B. were empowered by act of parliament, to purchase estates in a certain district, to enable them to build a square (*k*), C. who was a barrister at law, and who ap-

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(A) 3 Atk. 37.

ference to the point in the text.—Ed.]

(i) *Le Neve v. Le Neve*, 1 Ves. 64.
[See Amb. 627, where this is said to have been a case of fraud, but that, it is presumed, makes no material dif-

(k) *Sheldon v. Cox*, Amb. 624.—
[S. C. 2 Eden, 224.—Ed.] Et vide
Doe on dem. of Willis v. Martin, Mich.
Term, 31 Geo. 3. c. 39. (E)

(E) *Doe v. Martin* is reported in 4 T. R. 39. 66, where it was said by Lord Kenyon, that the maxim that the principal is civilly responsible for the acts of his agent, universally prevails both in courts of law and equity; and there-

Principal responsible for agent.

peared to have taken the management of the affair upon himself) purchased a parcel of ground held on a church lease, and borrowed 3500*l.* of D. and gave him a declaration of trust of the leasehold estates as a security, and delivered him the renewed leases: C. afterwards built several houses, some of which were erected upon the ground on which D. had his security, and then C. granted a lease of these houses to H., reserving a ground-rent; which was done for the purpose of establishing a rent; and H. declared himself in writing to be only a trustee for C. Afterwards H. assigned some of the houses in D.'s security to M., for securing a sum of money by him lent, and then he assigned all the houses to E. likewise, for securing a farther loan. Neither M. nor E. had actual personal notice of the mortgage to D., nor of each other's mortgage; but both M. and E. employed C. as their counsel and agent in these transactions, and nobody else. On a bill filed by D. for a sale of the estates, and to be paid his mortgage money in the first place, one question was, whether M. and E. were to be affected by the notice to C., their agent, of D.'s security; *Et per curiam*, it is a fixed and settled point, that notice to the agent is notice to the principal. C.'s acting in different capacities makes no difference. It is the same as if they had been in different persons (F).

Consequence of
both parties
employing same
attorney.

fore if the agent be guilty of fraud, although the principal take no part in it, yet will he be answerable for the effects of such fraud, and the transaction also will be vitiated by it. The consequence of the court acting upon this principle was, that in the case quoted, the purchaser lost an estate for which he had given nearly 8000*l.* merely by employing the vendor's attorney, who was privy to a fraudulent disposition of the purchase money. Hence the impropriety of the mortgagee's employing the attorney of the mortgagor; for if the mortgagor be guilty of any fraud or concealment, or if he has made any previous charge or incumbrance on the estate which is withholden from the mortgagee, and to which the attorney is privy, the mortgagee although it be proved that he was innocent of the fraud, and actually ignorant of the prior incumbrance, will nevertheless be responsible for the conduct of his agent, and be bound by the notice of a fact, the knowledge of which was in possession of his attorney; *et vide Mountford v. Scott*, 3 Madd. 34. 1 Turn. 278. Notice to an agent in a transaction must be notice to the principal; otherwise it would be in the power of any one by employing an agent to practice with impunity the grossest frauds; per Lord Manners, in *Downes v. Power*, 2 Ball & Bea. 499.

Agent being
owner of estate
no difference.

(F) The words in Eden's Reports are, "As to the second point, it is a fixed and settled principle, that notice to an agent is notice to the principal. If it were held otherwise, it would cause great inconveniences, and notice would

If one purchases in the name of another person, without any authority from him so to do, and he not having notice of this intention; yet, if he afterwards agrees to it, he makes the former his agent *ab initio*.

A. purchases with notice in B.'s name, but [585] without his authority, B. assenting to purchase, bound (a).

Thus where G. in 1699, lent W. 200*l.* upon a surrender of copyhold lands (*l*), but neglected to get the surrender presented at the next court day as he ought to have done, for want of which the surrender was void, according to the custom of the manor. In 1703, B. agreed with W. to purchase the mortgaged premises for 400*l.* and took a surrender in the name of M. who afterwards consented to become the purchaser, and paid the money. It was proved, that B. whilst he was treating with W. had notice of the former incumbrance, and therefore declined to purchase in his own name, and took the surrender in the name of M., and procured him to become a purchaser, that B. might be paid a debt, which W. owed him, out of the consideration money.

On a bill filed by the executor of G. (*m*), M. pleaded himself to be a purchaser without notice of the plaintiff's de-

(*l*) *Jennings v. Moore*, 2 Vern. 609. *Ed.*] Et vide *Merry v. Abney*, 1 Ch. S. C. 1 Bro. P. C. 244. [1 Eq. Ca. Ca. 38. Abr. 330. 2 Freem. 151. Nels. 59.— (*m*) *Ibid*.

be avoided in every case by employing agents. Cox being owner of the estate makes no difference; he acted in different capacities; and it is therefore the same as if it had been in different persons. There is no difference also between personal and constructive notice in its consequences, except as to guilt." See 2 Eden's Rep. 228.

(*G*) So a man cannot elude the effect of having notice by procuring the conveyance to be made to a third person. *Coots v. Mammon*, 2 Bro. P. C. 596. 5 Toml. ed. 355. In that case A. agreed to take a lease of certain lands, but previously to his signing the articles of agreement, he had notice that B. had a prior agreement for a lease of the same lands. A. disregarded this notice and procured the lease to be granted to his son. It was held, that this notice to the father affected the son, and the prior agreement being established, he was desired to deliver up the possession to B.

Notice not eluded by conveyance to trustee.

In a late case grants in reversion were obtained by an agent and trustee from his employers and *cestui que trusts*, by fraud and misrepresentation, and afterwards assigned by him for valuable consideration to a purchaser, who had notice of the facts and nature of the title, the grants and assignments were on that account set aside, both against the agent and purchaser under him. *Dunbar v. Toddennick*, 2 Ball & Bea. 304.

Purchase with notice, set aside.

mand; and that his surrender was presented, and he admitted tenant, without notice of G.'s surrender, which was kept in his pocket, and not presented till long after his purchase, surrender, admittance, and payment of his consideration-money. But it was adjudged at the Rolls, that notice to B. was sufficient to affect M.; for, though he did not employ B. to purchase for him, or knew any thing of it until after B. had agreed and taken the surrender in his name, yet he, by approving of it afterwards, had made B. his agent *ab initio*; and M. was decreed to pay the 400*l.* and interest, or to surrender to the executor of G. (H).

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Notice to agent, counsel, or attorney must be in same transaction (1).

But, examining a title in *one* transaction, in the ordinary course of business, which cannot be supposed to make any impression, as to any future event, will not operate as constructive notice to an agent in general, or counsel, or attorney, to affect his client on a *subsequent* transaction, and in another business at a distant period (n); for, an agent or counsel cannot be supposed to remember every particular circum-

(n) *Fitzgerald v. Falconbridge*, cited 2 Ves. 369. 370. 3 Atk. 294. *S. C.* *Fitzg.* 211, et vide *Worsley v. Scarboro'*, 3 Atk. 392. [But where a subsequent lease was made to one by

way of mortgage, who had notice of a prior lease made for raising children's portions, it was set aside. *Aldridge v. Duke, Finch*, 439.—*Ed.*]

Case in text affirmed in Dom. Proc.

(H) The words of the decree were, "that the defendant B. was the agent of the defendant M., touching the said purchase of the said estate: that the defendant M. is bound by the fraud of the defendant B." Reg. Lib. 1707. A. fol. 351, affirmed in Dom. Proc. 1 Bro. P. C. 244.

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(I) And between the same parties, *Worsley v. Scarboro'*, 3 Atk. 392, and this principle is adopted as well at law as in equity, 4 T. R. 66.

Of the distance of time between the transactions.

But in a late case the Lord Chancellor said he should be unwilling to go so far as to say that if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening, it must in all cases depend upon the circumstances; and his Lordship seemed inclined to fix an assignee of an under-lease with notice of a deposit of the original lease from the circumstance of the same attorney having in February prepared the under-lease (when he communicated with the person holding the original lease), and in March following, preparing an assignment of that under-lease to a person who denied notice of the deposit. *Mountford v. Scott*, 1 Turn. 280, qualifying in some degree the doctrine of his Honor the Vice Chancellor, delivered in a former stage of the same cause, 3 Madd. 34.

stance, contained in deeds or papers that come under his perusal.

And Lord Hardwicke, in the case of *Warwick v. Warwick* (o), expressed his approbation of the rule laid down in the case of *Fitzgerald v. Falconbridge*, above-mentioned, that notice should be in the same transaction, and his Lordship said, that it should be adhered to, otherwise it would make purchaser's and mortgagees' titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions (κ). And in the principal case, it was held, that notice, arising from a case stated (by one who was an agent for both parties in a subsequent mortgage) in order to do something towards suffering a common recovery, a year and six months before the party was to be affected with this notice, was not sufficient to affect a purchaser. However, there were other circumstances in the case favorable to the purchaser.

Mortgagee not affected with notice to his attorney eighteen months before.

(o) 3 Atk. 294.

(K) S. L. ante, vol. i. p. 554, n. (Y), *quod vide*. So, per Lord Keeper North, in *Preston v. Tubbin*, 1 Vern. 286, though notice to a man's counsel be notice to the party, yet where the counsel comes to have notice of the title in another affair, which, it may be, he has forgotten when his client comes to advise with him in a case with other circumstances, that shall not be such a notice as to bind the party. Et vide *Harvey v. Montague*, 1 Vern. 37. 122, and *Anon. ibid.* 318. The rule that notice to be binding must be in the same transaction, is still further exemplified by the case of a member of parliament, mentioned in Duke's Char. Uses, p. 64. 638. There land given to charitable uses was intended to be sold by act of parliament, and when the bill was read in parliament, it was declared that the land was chargeable with a charitable use, and an offer was made to otherwise assure the charitable use. The bill, however, did not pass, and the land was afterwards sold to one of the members of the house, who spoke in the debate on the bill; yet this notice was held not to be sufficient; because it was not known to the purchaser except as a member of parliament. *East Grinstead Case*, Duke's Char. Uses, ubi supra; et vide Toth. 160, ed. 1649, or 258, ed. 1671.

Notice to agent must be in same transaction.

If an executor after his office has ceased, advances money to two persons on security of land devised to them as trustees under the will, by which he was appointed executor, it is apprehended that he will not be saddled with notice of the trusts of the will, merely from the circumstance of his having been executor of that will. But a tenant for life of the land advancing the

*Executor.
Tenant for life.*

No notice to mortgagee of prior settlement from his attorney having made settlement two years before (L).

So, where lands were settled by F. on his marriage in 1734, which he mortgaged, among others, in 1736, to W. who had no notice of the settlement, and R. was employed as agent in making both the settlement and the mortgage; one question was, whether W. should be considered as having notice of the settlement, R. having acted as agent on both occasions (*p*)? And the court held, that affecting a person with notice of the title of another, by reason of his agent's having notice of it, had not been carried so far, as to affect the principal, unless where the agent had it, at the time of his transaction with him; and that, as the notice which the attorney had of the settlement, in this case, was two years before the mortgage, the mortgagee could not be affected by it.

Attorney not employed throughout, notice to him will nevertheless affect principal Semb.

It hath not been settled, whether, where one employs an attorney or counsel, and, for want of dispatch, takes the matter afterwards out of his hands, and gives it to another agent to finish, and the first agent acknowledges notice, but no proof of notice of a prior incumbrance can be had against the subsequent agent, notice to the first agent shall bind the party himself (*q*). But it seems reasonable that, *in the case put*, the client should be bound; for the first agent is stated to have entered upon the business, the last agent to have finished it; and the law presumes, that whatever is known to the agent is likewise known to the principal; therefore, as the client must be considered, in law, as taking the business out of the hands of the former agent, with all the information the former agent had thereupon, the client must consequently be considered, either as having lost that knowledge on the transfer to the last agent, which would be absurd, or, as delivering the matter over to him subject thereto; any other

(*p*) *Steed v. Whitaker*, Barnard. 220.

(*q*) *Vane v. Barnard*, Gilb. Eq. Rep. 7, 8.

trustees money, would clearly have notice of the trusts of the will whereby his estate for life was created, and if the will do not contain a clause indemnifying persons paying or advancing money, the lender must see his money applied for the purposes of the will, or be responsible for the misapplication of the same.

(L) What notice a clerk has by engrossing a deed prejudicial to his rights, see ante, vol. i. 439 a, note (K).

construction would open a door to great fraud between a first agent and his client; for then the latter, on discovery that the former had notice, might remove any impediment arising from notice to his first agent, by taking the business out of his hands, and giving it to a new agent (M).

But the law might be more doubtful, if the first agent, by any accident, had given up the business, *without entering thereupon*; for it would be carrying this doctrine of notice very far indeed, to say, that the mere depositing the papers in an agent's hands, with a view to employ him, and taking them away before inspected, should be notice to the client of a fact, of which the agent, had he inspected them, would have found himself without notice. *Sed quære.*

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Whic? if business be taken from attorney before he enters upon it.

And though counsel, &c. concerned for one of the parties may, if he pleases, demur to being examined as a witness (r), yet, if he consents, the court will not refuse reading his deposition, for the right to object is *his* privilege, not that of his client (N).

Optional with counsel, &c. to be a witness.

(r) [Per three judges against one, [2 Ves. 445.] *Waldron v. Ward*, Sty. in *Matthews v. Temple*, Holt, C. J. 489, contra, 10 Mod. 41. dissent.] Comb. 467. 1 Ves. 63.

(M) The point may now be considered as settled by the case of *Bury v. Bury*, App. Sug. V. & P. No. xxv. p. 61, 5th ed.; on the reasons, perhaps, of the learned author, as adduced in the text. In the case alluded to, Lord Hardwicke said, that as to the first point there was no positive evidence of notice: the defendant denied it by her answer, and there being only one witness against that answer, a decree could not be made upon that one witness's testimony.—Where an agent had been employed for a person in part, and not throughout, yet that affected the person with notice. In the case before him the recital in the deed of the power of jointuring was sufficient to have made the defendant have inquired into it; and therefore his Lordship held *that* should affect her.

Rule that notice to agent not employed throughout, is notice to principal, confirmed.

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(N) The contrary was holden in *Lord Say and Sele's Case*, 10 Mod. 41, as the learned author has noted in his reference n. (r); and this is now the prevailing opinion of the profession; for it is considered that a counsel or attorney ought not to be permitted to divulge the secrets of his client, though he offer himself for that purpose; it being contrary to the policy of the law to permit any person to betray a secret with which the law has entrusted him. *Cuts v. Pickering*, 1 Vent. 197. And at common law confidential communications between attorney and client are not to be revealed at any period of

Counsel, &c. not permitted to reveal secrets, though they offer to do so.

But he cannot refuse to give evidence of execution of deed.

The true time of executing a deed is not such an act, of which an attorney may refuse to give evidence (s); for a thing of such a nature as the time of executing a deed, could not be called the secret of a client; for that is a thing of which he may come to the knowledge without his client's acquainting him therewith, and is of that nature, that an attorney concerned, or any body else, may inform the court of it (o).

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Attorney concealing incumbrance liable to make satisfaction.

Neither can an attorney screen himself under this rule, if he does not disclose to the purchaser of an estate, whether absolutely or by way of mortgage, any incumbrance therein with which he is acquainted (t); for it is a principle of equity, that in transacting a purchase or bargain, wherever the buyer is drawn in by misrepresentation or concealment of a material fact or circumstance, so as to be injured thereby, and that done with intention and fraud, he is entitled to satisfaction. And this rule is not only applicable to all persons having an interest in the thing contracted about, but also to the agent, attorney, or solicitor of the buyer, having a trust and duty

(s) Vide 10 Mod. 41.

(t) *Arnot v. Biscoe*, 1 Ves. 95.

time—not in an action between third persons—nor after the proceeding to which they refer is at an end—nor after the dismissal of the attorney; for, says Mr. Justice Buller, in the case of *Wilson v. Rastall*, 4 T. R. 759, 760, “it is not sufficient to say the cause is at an end; the mouth of such a person is shut for ever.” See also *Lindsay v. Talbot*, Bull. Ni. Pri. 284 a. and see Mr. Bridgman’s n. (a). *Wilson v. Rastall*, 4 T. R. 753. *Wright v. Mayor*, 6 Ves. 280. *Stoman v. Herne*, 2 Esp. Ca. 695. *Brand v. Ackerman*, 5 ibid. 119. *Fountain v. Young*, 6 ibid. 115. *Rex v. Withers*, 2 Campb. 578. ibid. 10. and Phil. Law of Evid. 140, 4th ed.

Attachment of attorney for refusing to give evidence.

(O) Indeed, if the defendant’s attorney who is a subscribing witness to an agreement, upon which the plaintiff brings his ejectment, refuses to give evidence of his attestation, the court out of which the record issues will grant an attachment against him. *Doe v. Andrews*, Cowp. 845. Every person who claims an interest in the property has a right to call upon the attorney as being the attesting witness. *Robson v. Kemp*, 5 Esp. Ca. 52. Nor does this privilege of attorneys, &c. extend to their executor, see ante, vol. i. p. 379, n. (G); nor to communications from collateral quarters, although made in consequence of the character of attorney, &c. The privilege is restricted to communications whether oral or written, from his client to the attorney. *Spencely v. Schulenburg*, 7 East, 357. For what a counsel or attorney may disclose on examination in courts of common law, see Bridgm. Bull. N. P. 284 b. n. (a); and Phil. Law of Evid. Chap. VI. and Index, voc. Counsel.

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with his principal, who is also liable to make satisfaction, if participant in the transaction. Therefore, if the attorney of the vendor of an estate, acquainted that there are incumbrances thereon, treats for his client in the sale thereof, without disclosing them to the purchaser or contractor, knowing him a stranger thereto, and represents it so as to induce the buyer to trust his money thereupon, a remedy lies against him in a court of equity. And it is necessary that courts of equity should adhere to this principle, to preserve integrity and fair dealing between man and man, most transactions being by the intervention of an attorney or solicitor. This case, therefore, is distinguished from that of disclosing the general circumstances of a client, with the knowledge of which an agent is trusted, of which it would not be proper to give notice.

And if the discovery of that (μ), of which a counsel is called upon to give evidence, be made to him before such time as he is retained, he is not entitled to his privilege, but may be sworn. *Counsel's knowledge before retainer, not privileged.*

If one take a mortgage by assignment from a mortgagee (x), affected with notice of an outstanding title, he will take subject to that title, for his assignor cannot transfer to him a better right than he has himself. *Assignee of mortgagee affected with notice of his assignor.*

And if such original mortgagee, in a bill filed by the person setting up an *eigne* title against the mortgagee and his assignee, and praying to be let into possession, charging notice, confess by his answer, that he had notice before the lending of the money; that confession of notice will bind his assignee; for though the mortgagee's answer cannot be read against the assignee as evidence, yet he must stand in his assignor's place, and then his assignor's confession of notice will bind him (y). *And assignee bound by mortgagee's confession of notice in his answer.* [590]

(n) *Cuts v. Pickering*, 1 Vent. 197; [and on what facts an attorney or counsel may be examined at common law, see 1 Phil. on Evid. 143.—Ed.]

(x) Vide *Whalley v. Whalley*, 1 Vern. 484.

(y) Vide *Whalley v. Whalley et al'*. 1 Vern. 484.

Second mortgagee with notice of first, but without notice of charge prior to both, of which first mortgagee has notice must take subject to that demand, and consequently to the notice (P).

Legal estate not taken from mesne mortgagee.

Puise mortgagee lending money after act of bankruptcy not deprived of eigne mortgage purchased in, if eigne mortgage be given before act committed (Q).

Therefore, if an estate be settled upon trust for raising a specific sum, and afterwards a mortgage be made thereof to a mortgagee, with notice of that trust, and then a subsequent mortgage be made to one who hath notice of the prior mortgage, but not of the antecedent trust of which the first mortgagee had notice, yet the last mortgagee must take subject to that demand (s); for he having notice of the first mortgage, which is prior to his, but posterior to the trust, must consequently take subject to the first mortgage; and being subject to that, must be subject to every thing that was subject to. This may be proved, by considering the right and order of redemption in the Court; as for example, the *cestui que trust* of the trust-estate, having a prior incumbrance, may compel the first mortgagee to redeem him, which if done, the former will have a right in both capacities to compel the last mortgagee, or those claiming the benefit of that mortgage, to redeem him as to both; for a court of equity will not take from the *mesne* mortgagee the legal estate, which he will have got from the trustees, unless his demand be wholly satisfied.

Notice of an act of bankruptcy will not be presumed against a *puise* mortgagee, who lends his money after the act of bankruptcy committed, to take from him the benefit of an *eigne* incumbrance purchased in; for though, at law, the assignment to the assignees hath relation back to the time of the act of bankruptcy committed, and the construction of

(z) *Earl of Pomfret v. Lord Windsor*, 2 Ves. 185.

(P) *Secus*, if the first mortgagee have no notice of the charge, or if the second mortgagee have no notice of the first, 2 Bro. C. C. 66. And it is at least questionable whether a second mortgagee having notice of the first is bound to inquire into all the liabilities of the first mortgagee. He has simply notice of the first incumbrance, and it is not likely that he could obtain permission to inspect the first mortgage deed. The position in the text certainly requires qualification at the present day. See also *Coo. Mortg.* 357.

Voluntary and compulsory payments to bankrupt distinguished.

(Q) *Note*, voluntary payments to a bankrupt, with notice of an act of bankruptcy actually committed are bad, *Pricket v. Down*, 3 Campb. 131; but payments enforced by coercion of law are good against the future assignees. *Foster v. Allanson*, 2 T. R. 479. The same distinction was taken in *Pym v. Benson*, 1 Freem. 349.

statutes be the same in equity as at law, yet it would be too hard to extend a penal law, in a court of equity, to the prejudice of the mortgagee. Besides, where a statute is to be carried into execution, *in equity*, the rule, *that a purchaser for a valuable consideration, without notice*, shall not be deprived of any advantage, which will enable him to defend himself, will be applied as well in cases arising under an act of parliament, as in those occurring at common law.

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Thus where T. having made mortgages (a) of some parts of his estate, these mortgages afterwards, by *mesne* assignment, became vested in W. and carried with them the legal estate. T. then became a bankrupt, but, before the assignment of T.'s effects to the assignees, W. obtained a release of the equity of redemption from T. for a valuable consideration; on a suit brought by the assignees against W. to set aside these conveyances, it was held, that a purchaser for a valuable consideration, without notice of the bankruptcy, could not be relieved against, within 21 Jac. 1. (R).

Assignees cannot compel redemption against mortgagee having legal estate and purchasing equity of redemption after act committed, but without notice thereof.

(a) *Collett v. De Golls*, Ca. temp. Talb. 65. For. 70.

(R) Cap. 19. s. 14. Before that statute a sale or mortgage by a trader, after an act of bankruptcy upon which a commission afterwards issued, might be defeated at any period however distant. The death of the trader without a commission of bankrupt against him, was the only certain security to a mortgagee or purchaser under him. The above statute enacted that no purchaser for good and valuable consideration, should be impeached by virtue of this act, or any other act theretofore made against bankrupts, unless the commission to prove him or her a bankrupt should be sued forth against such bankrupt within five years after he or she should become bankrupt. Sir S. Romilly's act, 46 Geo. 3. c. 135. 1806 (explained and extended by 49 Geo. 3. c. 121. and see 1 Campb. 491) followed and reduced the period of five years to two calendar months, as stated in a previous note. See ante, vol. i. 558, n. (T). By Sir Samuel Romilly's act, all conveyances by, all payments to, and all contracts with a bankrupt, made *bonâ fide* two months before the date of the commission of bankrupt, are declared good and binding on the assignees. To a conveyance therefore after a commission issued, or a docket struck, this statute does not apply. But the statute of James may, in such a case, it is presumed, if five years have elapsed since the conveyance, be insisted on as affording substantial relief, provided the purchaser had not actual notice of the commission or docket previously to his paying his purchase-money, or to the execution of the conveyance. Consequently the statute of James is not entirely repealed by the late act of Geo. 3.

Stat. of James not repealed by Sir Samuel Romilly's act.

The

Mortgagee having best right to legal estate may protect

And, if the mortgagee hath a better title or right to the legal estate (*aa*), although it be not conveyed to him, yet he may

(*aa*) [As to such better title or right, see ante, vol. i. 449, n. (S).—Ed.]

Subjects for consideration proposed.

The proposition of the learned author in the text is, that as to the statute of James, if a purchaser *bonâ fide* without notice of the act or commission of bankrupt, can procure a legal estate, he may protect himself under that legal estate both as against an act and a commission of bankrupt, however recent or however long ago that act or commission may have been committed or issued. The soundness of this position we propose in this note to investigate; and then, 2dly, to inquire whether a similar doctrine can be stated in regard to the late act of 46 Geo. 3.

Collett v. De Golla confirmed by Lord Eldon.

1st. The principal authority for the above doctrine is the decision of the Court of Chancery, in the before-mentioned case of *Collett v. De Golla*, which subsequent *dicta* have greatly invalidated, if not entirely over-ruled, but upon what grounds we are now to consider. The words of Lord Talbot in *Collett v. De Golla* are these:—"There certainly may be cases where a purchaser for a valuable consideration, without notice of an act of bankruptcy, shall not be obliged in this court to discover any thing (whether incumbrances that he has got in, or any other thing), but all advantages shall be left him to defend himself. Suppose two purchasers without notice, and the second by chance gets hold of an old term, he shall defend himself thereby against the first, who still is as much a purchaser for a valuable consideration as himself. *I do not therefore think a purchaser for a valuable consideration, without notice of the bankruptcy to be relieved against in this court within 21 Jac. 1st.*—This case of *Collett v. De Golla* is generally considered as deciding, that if a mortgage of a legal estate be made before an act of bankruptcy, and the mortgagee make further advances after the act committed, but without notice thereof, the assignees cannot compel a redemption without paying all the money advanced; that is, that the mortgagee not having had notice, may make use of his prior legal estate as a protection against the act and commission of bankrupt. This is in a great measure confirmed by what fell from the present Lord Chancellor, in the case of *Knott, Ex parte*, 11 Ves. 609. His Lordship, in the course of the arguments, in that case, said, "the case of *Collett v. De Golla* proves that money advanced after an act of bankruptcy, may be tacked and charged upon the estate, notwithstanding the property is taken out of the bankrupt; and it was urged there, that he had nothing to convey by the said mortgage; yet it was held, that though the legal effect of the second mortgage was nothing, the court would consider it a second incumbrance. The distinction was taken, that a secret act of bankruptcy did not prevent tacking as a commission actually issued did; that being notice to all the world." *Sed vide* what is said, ante, vol. i. 552, n. (T), as to a commission being notice to all the world.

Further arguments in favor of that case.

His Lordship again alluded to the principle of *Collett v. De Golla*, in the course of his judgment in the above-mentioned case of *Knott, Ex parte*, see 11 Ves. 619, where he in effect observed:—"It is said the act divests the bankrupt of all his interest, and when the commission follows, it operates by

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protect himself thereby, from an act of bankruptcy. Thus, *himself from act of bankruptcy.* where H. B. on May 1st, 1710, was arrested at the suit of one

relation from the time the act of bankruptcy was committed; and then the person taking the second security really takes nothing: no interest passing from the bankrupt, there can be no tacking; for the operation of the commission is to reduce to dust and ashes the second security. But all the cases shew that this objection will not do; for then it would have been in vain to discuss whether there is a difference between securities after an act of bankruptcy and after a commission issued." This, it is apprehended, is the true interpretation which the evasive and conflicting report of Lord Eldon's observations in *Knott, Ex parte* (11 Ves. 619), ought to receive. The marginal note too of that case favors this construction, "the right to tack in equity is not affected by the relation to the act of bankruptcy." Indeed, the effect of a different interpretation would be to over-rule the case of *Collett v. De Golls*, which appears to have been long acquiesced in, and which Lord Eldon, from his previous recognition of that determination in the same case, could never have meant to have done; for certainly his Lordship could not have been aware that the authority of that case had ever been impugned, and at the same time have decided in direct conformity with it.

Next follows the two cases which are said to militate against the authority of *Collett v. De Golls*, so far as that case tends to support the doctrine above stated; the first is that of *Latouche v. Dunsany*, 1 Sch. & Lef. 152; and the second that of *Herbert, Ex parte*, ubi infra. *Latouche v. Dunsany*, turned on the construction of the registry act; and a comparison was made between the principle there contended for and that laid down in *Collett v. De Golls*, where it was said, that in the last-mentioned case equity refused to take the legal estate from Ward, unless upon payment of the sums advanced *after* the bankruptcy without notice, though the words of the bankrupt laws were as strong for avoiding all acts done after bankruptcy, as those of the registry act to avoid the unregistered deed. The court however observed, that "it was then the constant practice for the assignees to compel a redemption on payment only of what was advanced before the bankruptcy;" and decided, that a mortgagee is prevented by the operation of the registry act, 6 Anne, c. 2. from tacking so as to gain priority against mesne registered incumbrances. On this case it is worthy of remark, that the observation of the court on *Collett v. De Golls* was perfectly gratuitous, and what perhaps it would not have made on a full inquiry into the question, had it been called upon expressly to decide the point. The decision was in unison with the remark, because not only in that case, but in every case where a first mortgagee makes further advances having notice of the second, either by act of parliament, registry, or actual information, the decision must be the same; and therefore it cannot be inferred, that the *dictum* of the court had any influence on its subsequent determination, so as to make it applicable to a denial of the authority of *Collett v. De Golls*.

Lord Redesdale's dictum against it.

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The second case is that of *Herbert, Ex parte*, 13 Ves. 183, which assumes more of an hostile aspect, and threatens entire destruction to the decision we are now considering. Lord Chancellor Erskine is reported to have said, that

Case in text over-ruled by Lord Erskine.

S. (b), for a just debt of 790*l.* secured by bond; he, for delay,

(b) *Wilkes v. Bodington*, 2 Vern. Abr. 119, largely stated upon further 599, ante, vol. i. 449, 50. [et vide *S. C.* hearing.—Ed.]
semb. *nomine Read v. Ward*, 7 Vin.

the moment an act of bankruptcy is committed, there is an end of all relation between the individual and his property, and the party taking the security afterwards takes nothing; and his Lordship gave judgment accordingly. On a subsequent day, however, some of the parties not being aware that judgment had been given, Lord Erskine went through the circumstances of the case again, repeating his clear opinion, that the case of *Collett v. De Golls* was not law, principally on the authority that Lords Eldon and Redesdale had (as his Lordship understood them) both expressed their opinions against that case. In this however Lord Erskine seems to have been mistaken, especially as to the opinion of the former noble Lord, as will, it is conceived, be apparent by reference to the extracts from Lord Eldon's judgment in *Knott, Ex parte*, introduced in the earlier part of this note.—The case of *Herbert, Ex parte* is an express authority for the position, that a mortgagee cannot tack subsequent advances to his mortgage if those advances have been made *after* the mortgagor has committed an act of bankruptcy, although they may have been without notice of the act committed, and the mortgagee might have had a prior legal estate. The reason inducing the determination in this case might perhaps have arisen from the consideration, that the act of bankruptcy was of itself constructive notice to all the world, provided a commission issues in relation to that act. If that be admitted, the case is reconcileable with the former authorities; and it is barely necessary to remark, that such appears to have been the prevailing opinion at the time the case of *Herbert, Ex parte*, was decided. But it seems to be a settled point now, that a commission of bankruptcy is not of itself notice, nor is the advertisement of the party's being found a bankrupt, which is always inserted in the Gazette, of itself notice to the creditors, or what they are bound to take notice of. That is a circumstance, says Lord Ellenborough, in *Howell v. Browning*, 7 East, 161, from which the jury may presume notice, but it is not in itself actual notice. But further with respect to the cases of *Latouche v. Dunsany* and *Herbert, Ex parte*, and even of *Knott, Ex parte*, it seems to have escaped observation that the precise point in dispute had been previously decided by the case of *Hitchcock v. Selgwick*, ante, vol. i. p. 552, n. (T), in the House of Lords, which of course is an authority paramount to all others. It was by that case in effect determined, that a mortgagee, not having actual notice of the act of bankruptcy or commission of bankrupt, may tack advances made subsequently, not only to the act of bankruptcy, but also even to the commission issued. "Suppose a man" (says Lord Mansfield in *Foxcroft v. Devonshire*, 2 Burr. 938,) "*bonâ fide* lends money to a trader, upon a mortgage after an act of bankruptcy without notice, and then knowing of the commission of bankruptcy and assignment, gets in an old term, even for little or no consideration, and the assignees bring an ejectment; and it becomes a question whether this be a fraud or not; this is a matter of law; and the law will say it is no fraud;

Grounds of his
Lordship's de-
cision question-
ed.

pleaded it was for money won at play, and held out the plain-

for the mortgagee had a right to do this." The new Bankrupt Act is noticed *infra*, page 596.

As to notice in the Gazette, it is observable, that neither the daily papers *Gazette*. nor the London Gazette are in themselves notice to an individual creditor, unless it be proved that the particular passage (or at least the paper containing the notice) has been read by him. *Boydell v. Drummond*, 2 Campb. 157. *Rex v. Gardner*, ib. 513. *Graham v. Hope*, Peake's Ni. Pri. Ca. 154. *Gorham v. Thompson*, ib. 42; an advertisement in the London Gazette is only notice to strangers who are not creditors at the time. *Godfrey v. Turnbull*, 1 Esp. 371, and vide *Barfoot v. Goodall*, 3 Campb. 147.

We may therefore venture to conclude, that the case cited in the text is an existing authority; for the doctrine advanced by the learned author, notwithstanding its principle has been doubted, and even in one case expressly overruled. But it must, it is apprehended, be received with this qualification, that the legal estate, to afford protection, must have been created five years before the commission issued; for otherwise such legal estate will be impeached under the statute. To illustrate this by example: suppose an act of bankruptcy to have been committed in 1810, a mortgage of the legal estate for a term to have been executed in 1812, a commission of bankrupt to have issued in 1815, and the estate to have been sold by the bankrupt (before an assignment to the assignees) to a purchaser for valuable consideration, without notice of either the act or commission of bankrupt, and the purchaser to have paid off the mortgage made in 1812, and have procured an assignment of the legal estate for the term to a trustee of his own nomination,—in this case, it is conceived, the purchaser could not shelter himself under the protection of the legal term against the claim of the assignees; for the mortgage itself was impeachable under the statute, the commission having ensued in due time on the act of bankruptcy. And this, it should be remembered, is a case without the scope of the late act, to which it is now time to advert.

2dly. It was proposed to inquire whether, under the act of 46 Geo. 3. c. 135, a *bona fide* purchaser between an act of bankruptcy and the issuing of a commission, or after a commission actually issued, but before an assignment to the assignees (such purchaser being without actual notice of either the act or commission), can, by procuring a legal estate, created two calendar months prior to the commission issued or docket struck, protect himself against the assignees of the bankrupt vendor.

The statute enacts, "that in all cases of commissions of bankrupts thereafter to be issued, all conveyances by, all payments by and to, and all contracts and other dealings by and with any bankrupt, *bona fide* made and entered into more than two calendar months before the date of such commission, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be good and effectual to all intents and purposes whatsoever, in like manner as if no such prior act of bankruptcy had been committed, provided the person or persons so dealing with such bankrupt, had not at the time of such conveyance, payment, contract, dealing, or transaction, any notice of any prior act of bankruptcy by such bankrupt committed, or that he was in-

Act and commission of bankrupt may be evaded by prior legal estate under statute of James.

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Whether same may be said with reference to the statute 46 Geo. 3.

Sir Samuel Romilly's act.

tiff above six months, which, although he afterwards paid the debt, and many thousand pounds to others, and appeared

solvent, or had stopped payment;" and it is, in the third section of the act, provided "that the issuing of a commission of bankrupt, although such commission shall afterwards be superseded, [or the striking a docket for the purpose of issuing a commission, whether a commission shall actually issue thereupon or not], shall be deemed notice of a prior act of bankruptcy for the purpose of the act, if it shall appear that an act of bankruptcy had been actually committed at the time of issuing such commission or striking such docket."

Whether purchaser after act or commission of bankrupt without notice of either, may protect himself by prior legal estate?

If, therefore, an act of bankruptcy be committed to-day, a mortgage for a term of 1000 years executed by the bankrupt to-morrow, and no commission issued for more than two months after the mortgage, the mortgage, it is clear, will be binding on the assignees of the bankrupt mortgagor. Let us further suppose, that two months and a day elapse between the mortgage and the commission, and in the interval the bankrupt to sell his equity of redemption to A. (which sale would be clearly void as against the assignees), and afterwards A. to purchase in the prior mortgage, many writers on this subject agree that A. may make use of the legal estate thus acquired as a protection against the assignees: and *this*, perhaps, on the rule in equity, that a purchaser for a valuable consideration without notice shall not be deprived of any advantage which he may derive from the legal estate at law. But this rule would have been applied with more force if the purchase of the equity of redemption had been made after the commission issued, and the legal estate had been more than six years standing, as then the act of Geo. 3. would not have applied, and the statute of James might have been over-reached by means of the legal estate. It cannot, however escape observation, that in the case where A. purchases the equity of redemption in the two months interval between the mortgage and commission, he will be a purchaser with notice of a prior act of bankruptcy; for the issuing of the commission before two months have elapsed since his purchase, will, as to that purchase, affect him with notice of the prior act of bankruptcy, by means of the proviso added to the third section of the act of Geo. 3; and though in a similar case under the statute of James, the argument of a purchaser without notice may, under the authority of the case quoted in the text, prevail in favor of the purchaser of the equity of redemption against the assignees, yet it could not under the act of Geo. 3. because the subsequent commission is declared to be notice of the prior act of bankruptcy, provided such commission be sued out within two months after the purchase or conveyance.

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Expressions of doctrine by Mr. Preston and Mr. Madock.

Mr. Preston expresses the doctrine in these terms:—"A legal estate will protect a purchaser from an act of bankruptcy of which he has not any notice. *De Golls v. Ward*, Ca. Temp. Talb. 243. 7 Vin. Abr. 121. But at this day no one will readily accept the title of a trader after notice of his insolvency by a composition with his creditors. And after a man has committed an act of bankrupt (*Lowes v. Lush*, 14 Ves. 547. *Franklin v. Lord Brownlow*, *ibid.* 550), he cannot force his title on a purchaser by a bill for specific performance." 3 Pres. Abs. 390. The first sentence of this passage supports the position, that a purchaser after a commission issued, who ac-

publicly on the exchange, was adjudged an act of bankruptcy by the statute of Jac. 1. Afterwards, in 1717, H. B. on the mar-

quires a prior legal estate, may defy the assignees notwithstanding either statute (taking a commission issued not to be in itself notice), but militates against the doctrine that, under the late act, a purchaser of the equity of redemption, acquiring a prior legal estate, may also set the assignee at defiance; for such a purchaser is not a purchaser without notice. Mr. Maddock, treating of the doctrine of tacking a first and second mortgage together, conceives, that under the 46 Geo. 3. c. 135, if the subsequent mortgage were made *bonâ fide* two months before the date of the commission, without notice of any prior act of bankruptcy, or that the mortgagor was insolvent, or had stopped payment, the same might be tacked. Of this there can be little doubt, notwithstanding what was said in *Knott, Ex parte*, 11 Ves. 686, namely:—"that a mortgagee will not be permitted to tack as against assignees in bankruptcy a mortgage subsequent to an act of bankruptcy, though without notice and previous to the commission; for that, by such mortgage, no interest passes." Mr. Sugden, on the same subject, observes,—“So where a purchaser *bonâ fide*, and without notice, has a prior legal estate, he may, notwithstanding either of the acts, make use of it as a protection against the assignees. The grounds of this opinion upon the late act are, that it was passed in favor of purchasers; that it does not say affirmatively, that a commission issued two months after a conveyance shall bind where a commission has been issued, or a docket struck prior to the purchase; but merely enacts negatively, that a commission issued after that time shall not bind, unless a commission was issued or a docket struck before the purchase.” These reasons however are far from convincing, and are not very intelligible. The proposition too, that if a purchaser has a prior legal estate he may make use of it against the assignees, is very vague and inconclusive.

Also by
Mr. Sugden.

From this view of the subject considerable difficulty arises in answering the question proposed in the second section of the note. If an answer (in the absence of express decision) may be hazarded, the editor submits, *first*, that a *bonâ fide* purchaser, between an act of bankruptcy and the issuing of a commission, cannot, by obtaining the assignment of an outstanding legal estate, created two months prior to the commission, protect himself against the assignees of the bankrupt vendor; and, *second*, that a *bonâ fide* purchaser, after a commission issued and before an assignment to the assignees (such purchaser being without actual notice of either the act or commission of bankruptcy) may, by procuring a legal estate, created two calendar months prior to the commission, defend himself against the assignees of the bankrupt vendor; for equity will not deprive him of the legal estate, which he has had the good fortune to acquire: and even supposing the bargain and sale of the commissioners to the assignees to relate back to the act of bankruptcy, and such act of bankruptcy to precede this latter purchase, yet, it is conceived, the purchaser would be safe, since an act of bankruptcy is not in itself notice, and the statute of Geo. 3. does not apply.

Points sub-
mitted.

But actual notice of an act of bankruptcy, or a commission of bankrupt, will entirely deprive the purchaser of all benefit to be derived from either of the acts of James the 1st or Geo. 3d.

Actual notice.

So much

riage of the defendant, his son, made a settlement, by which, after reciting that he had on his own marriage settled land, on trustees, in trust, to secure 2000*l.* to his wife if she survived; *H. B. with the privity of the trustees, who were parties to it*, assigned all his estate, right, title, and interest, to the wife's relation, for the benefit of *H. B. the son*, for life, and of his wife for life, &c. The plaintiff *W.* was the assignee under a statute of bankruptcy, taken out against *B.* subsequent to the

*Repeal of part,
and explanation
of other parts
of Sir S. Ro-
milly's act.*

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So much of the latter statute as makes the striking of a docket notice in all events, and which is inclosed in the above extracts between brackets, has been repealed by 49 Geo. 3. c. 121. The insolvency, mentioned in this statute, means a general inability in the bankrupt to answer his engagements. *Anon.* 1 Campb. 491, n. Mr. Justice Le Blanc, in a late case, (*Bayley v. Schofield*, 1 Maul. & Selw. 338,) took insolvency, as it respects a trader, to mean, that he is not in a situation to make his payments as usual, and that it does not follow that he is not insolvent, because he may ultimately have a surplus upon the winding up of his affairs; and Mr. Justice Bayley agreed, that insolvency means that a trader is not able to keep his general days of payment; and that he is not to be considered as solvent, because possibly his affairs may come round. The provision, that the issuing a commission shall be notice, although such commission shall afterwards be superseded, extends even to a commission which has been superseded without being opened, although it has been contended, that the legislature must have meant a commission opened and acted upon though afterwards superseded. See *Watkins v. Maud*, 3 Campb. 308, et vide other cases on this statute, *Brooks v. Sowerby*, 2 J. B. Moore, 55, and *Southwood v. Taylor*, 1 Barn. & Ald. 471.

*By the late act
6 Geo. 4. con-
veyances after
act of bank-
ruptcy valid,
when.*

By the late Bankrupt Act, 6 Geo. 4. c. 16. s. 81, it is enacted, that all conveyances by, and all contracts and other dealings and transactions by and with, any bankrupt, *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, *bonâ fide* executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed: Provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission, within two calendar months next after it shall have been superseded, no such conveyance, contract, dealing, or transaction, execution, or attachment, shall be valid, unless made, entered into, executed, or levied more than two calendar months before the issuing the first commission.

And not only are purchases *without* notice of an act of bankruptcy previously committed, thus protected, but purchases made with a knowledge that

settlement. The question was, whether a court of equity would decree the trustees of the first settlement, to assign the term to the plaintiff, or suffer it to rest in them, to protect the settlement.

For the defendants it was insisted, that they being purchasers without notice of the bankruptcy, equity ought not to impeach their title, if they could defend themselves at law;

the vendor had committed an act of bankruptcy, are in some degree defended from the attacks of the assignees; for by the stat. 6 Geo. 4. c. 16. s. 86, no purchase from any bankrupt *bonâ fide* and for valuable consideration, where the purchaser had notice at the time of an act of bankruptcy committed, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within *twelve* calendar months after such act of bankruptcy.

It is also enacted, by s. 82, that all payments really and *bonâ fide* made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt, (such payment not being a fraudulent preference to such creditor,) shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bonâ fide* made, or which shall thereafter be made, to any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt: Provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed.

With respect to notice, the new act has made great alterations. To de- Notice.
prive a party of the protection afforded him by the above clauses, he must have notice of a *prior act* of bankruptcy; all inquiry therefore into the solvency of the mortgagor's circumstances is unnecessary if the mortgagee has no notice of a prior act of bankruptcy committed; and as to constructive notice we have seen that the mere fact of a docket being struck, was soon found to be too oppressive to be deemed notice in itself. This gave occasion to the 49 Geo. 3. but the issuing a commission is scarcely more notorious than the striking of a docket; both are transactions necessarily known only to two or three clerks, and therefore ought never to have been deemed notice to all the world of an act of bankruptcy committed. Eden B. L. 248. In remedy of this, the 83d section provides, "that the issuing of a commission shall be deemed notice of a prior act of bankruptcy, (if an act of bankruptcy has been actually committed), provided the adjudication of the person or persons against whom such commission has issued *shall have been notified in the London Gazette, and the person or persons to be affected by such notice may reasonably be presumed to have seen the same.*" See also *infra*, additional Chapter, sec. XI.

and that, although they had not the legal estate in them, yet the trustees of the first settlement, in whom the legal estate was, *being parties to the last settlement*, were become their trustees. And it was so held by the Chancellor, who said, he took it to be the rule in equity, that where a man was a purchaser without notice, he should not be annoyed in equity, not only where he had a prior legal estate, but where he had a better title, or right to call for the legal estate than another; and therefore dismissed the bill.

Judgments on record not of themselves notice(s).

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A mortgagee may tack a *puisne* to an *eigne* incumbrance, notwithstanding an intermediate judgment at law; for though of record, it will not affect him, without he be proved to have had express notice thereof, before he lent his money. Thus, where the plaintiff, having a judgment and a mortgage (c), exhibited his bill against the mortgagor, and conusee of a statute by the mortgagor, to have a discovery of what was due on the statute, that being precedent to the plaintiff's securities, and, upon payment, to have the same set aside; the conusee pleaded, that, after the extent, the accounts had been stated between him and the conusor, and an absolute conveyance of part of the extended lands had been made to him in consideration of his re-assigning the remainder to the conusor; and that so he was a purchaser for a valuable consideration, without notice of the plaintiff's title.

They are at law, but not in equity, (T) argo.

It was insisted on behalf of the plaintiff (d), that his judgment being of record, the defendant was bound to take notice thereof, at his peril, and that, in this case, the defendant ought not to protect his pretended subsequent purchase by his

(c) *Churchill v. Grove*, 1 Ch. Ca. 35. *Grenvold v. Marsham*, 2 Ch. Ca. 170. S. C. Nels. Ch. Rep. 89. Et vide (d) *Ibid*.

Docketing judgments not notice.

(S) So, in *Snelling v. Squib*, 2 Ch. Ca. 47, a plea of purchase for valuable consideration without notice, was held good, though there was a judgment entered up against the vendor at the time of the purchase. In like manner Lord Talbot held, that docketing a judgment did not amount to constructive notice, for judgments were infinite. 2 Eq. Ca. Abr. 682, (D), n. (b). See also 2 Freem. 176, and further, as to judgments, ante, vol. i. 273, n. (O).

(T) No such distinction as this now prevails.

precedent statute, but that he ought, upon payment of the statute, to yield possession to the plaintiff. This was strongly opposed by the defendant's counsel (e), who argued, that though judgments were of record, and a purchaser was bound to take notice of them at law, yet, in equity, where the co-nusee of a judgment comes to be helped to extend his judgment against a purchaser, he must prove express notice of the judgment in the purchaser, or else shall never be relieved against him; and upon this point the plea was allowed.

But, in the last case, the term, "express notice," must be understood, as used in opposition to constructive notice, arising from the act being of record; for I apprehend, what shall, or shall not, be considered as evidence of notice of a judgment, independent of the record, is open to the opinion of the Court, and rests, either in positive proof of the express fact of notice, or in implication from other facts proved, irreconcilable with want of notice of the existence of the fact, notice of which is charged. And, consequently, that if there be any circumstances in the case, from whence it may reasonably be concluded, that the *puisne* incumbrancer had notice of a judgment standing out at the time of advancing his first money, the Court will not suffer him to protect himself by getting in a prior charge on the land, although no express notice be proved (v).

But there may be constructive notice of judgments, independently of record.

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Now we are speaking on the effect of notice of judgments; it may not be thought irrelevant to investigate the grounds on, and extent to, which judgments are binding on lands, in the hands of purchasers or mortgagees which will lead us to a knowledge of those cases in which it is material for a purchaser or mortgagee to attend to notice of judgments.

Of lien of judgment on land.

(e) *Churchill v. Grove*, 1 Ch. Ca. 35. S. C. Nels. Ch. Rep. 89. Et vide *Greswold v. Marsham*, 2 Ch. Ca. 170.

(U) If, for instance, it can be proved that the party searched the records of the court, this, it is conceived, will be enough to bind him with constructive notice of all judgments here entered, though he might have overlooked them.

At common law
lands not taken
in execution for
debt,

It seems perfectly clear, that by the common law (*f*), for a debt for which a man had a judgment, he could not have taken lands in execution, in the case of a common person, but the goods and chattels, and profits of the debtor's corn and other crops that grew upon the land; the reason of which was, that the law did not permit the creditor to take away the possession of the debtor's lands, for that would have hindered the following of his husbandry and tillage, which was beneficial to the commonwealth,

except crown
debts,

But the crown might, by its prerogative (*g*), have had execution against the lands of the debtor.

or lands where
in hands of
heir.

So, in the case of an heir, chargeable by the bond of his ancestor, the creditor might have taken all the lands of the ancestor in execution in the hands of the heir, by *levari facias*, and yet he could not have had any execution of them against the ancestor himself; the reason for which was, that the common law gave an action against the heir, and in such case, if he should not have execution against the land against the heir, he could have no fruit of his action; for the goods and chattels of the debtor belong to his executors or administrators.

Nor could a
use be taken
in execution.

No doubt, it is apprehended, can be entertained, but that if lands could not have been taken in execution upon a judgment at common law, in the case of a common person, *an use* could not; for at common law, in a stronger case, if *cestui que use* had been attainted of treason or other offence, the use was not forfeited to the king; *because it was a thing of which the law did not take notice* (*h*), for that the *cestui que use* had neither *jus in re* nor *ad rem*. And if an use was not forfeited, of which there might be a *possessio fratris*, &c. and which would descend to the heir, *à multo fortiori*, it could not be subject to the execution of a subject; for if it had been, then should a subject have been in a better condition as to a use, in re-

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(*f*) Sheph. Prac. Couns. 305. 2 Roll's Rep. 296. 2 Inst. 394. 2 Rep. 12. 3 Rep. 12. 2 Atk. 609. Amb. 16.

(*g*) Hard. 488. 495, 6. 3 Ch. Rep. 20. 11 Co. 92, 93.

(*h*) Hard. 492. 3 Inst. 19. *Marquis of Winchester's case*, 3 Rep. 1.

spect of execution upon a judgment, than the king, in respect of a forfeiture for treason; whereas it appears that, at the common law, the king was in a better condition than a subject, in respect of execution for his debt; as he could have execution for it against his debtor's lands, which the subject could not.

It follows from the above remarks, that as well lands, as uses and trusts, so far as they are, at this day, liable to execution in the case of a common person, are so subject by force of some statute.

By statute of Westminster, 2. [13 Edw. 1.] cap. 18. *Cum debitum fuit recuperatum* (i), when debt is recovered or acknowledged in the King's Court, or damages awarded, an election is given to the creditor to have a *feri facias* unto the sheriff to levy the debt of the lands and goods, or that he should deliver to him all the chattels of the debtor, except his oxen and beasts of the plough, and one half of his land "*medietatem terræ*," until the debt be levied upon a reasonable price or extent. From this right to elect, the writ of *elegit* seems to have taken its name (v). And it is

Execution against land given by stat. Westm. 2.

Origin of elegit (w).

(i) 3 Bulst. 63. 3 Rep. 12. F. N. B. 265. 9.

(V) Or rather from the words of the writ, *Quod elegit sibi executionem*, &c.

(W) A writ of *elegit* lies against the debtor in his life-time, or his heir and terre-tenants after his death, App. to Tidd's Practice, cap. xxxix. s. iii.; and it may be had against peers of the realm, as well as others; and also against executors and administrators; 1 Crompt. 346. Upon this writ, the sheriff is to impanel a jury, who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same; and also to inquire as to his lands and tenements. Co. Litt. 289 b. Dyer, 100. Cro. Eliz. 584. Com. Dig. tit. Execution (C). The goods and chattels being appraised, are to be delivered to the plaintiff, at the price set upon them; Gilb. Exec. 33, and in this respect an *elegit* differs from a *feri facias*, upon which the sheriff cannot deliver the goods, though he may sell them to the plaintiff. *Pullen v. Parbeck*, 1 Ld. Raym. 346. 2 Bac. Abr. tit. Execution, §49. 352. If the goods and chattels are sufficient to satisfy the plaintiff's demand, the sheriff ought not to extend the lands, 2 Inst. 395. 1 Crompt. 346, but otherwise he may extend them; and he may not only extend a moiety of the lands properly so called, but also a moiety of a reversion, Gilb. Exec. 38, or rent-charge, Moor. 32, or lands whereof a man is seised *jure uxoris*, Dalt. Sher. 136; or lands in ancient demesne, *Cox v. Barnsley*, Hob. 47, 48; in short, he may extend every other

Elegit, against whom, and for what it lies.

agreed by the best authorities, that this was the first statute that subjected the land to an execution upon a judgment, or a recognizance, which is in the nature of a judgment.

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species of landed property; but if an estate tail be extended, the issue may avoid it after the death of the tenant in tail, by assise or writ of *audita querela*, *Ashburnham v. St. John*, Cro. Jac. 85. Gilb. Exec. 391; and if one of two joint tenants confesses a judgment, and dies before execution, it will not bind the survivor. 1 Inst. 184 b. *Abergavenny's Ca.* 6 Rep. 79. But copyhold lands are not extendible. 1 Roll. Abr. 888; nor a rent seck, Cro. Eliz. 656; nor an advowson in gross, or glebe belonging to a parsonage or vicarage; nor the church-yard. Gilb. Exec. 39; et vide *Arbuckle v. Cowtan*, 3 Bos. & Pul. 327. A term for years may either be extended or sold as part of the personality. 8 Co. 171. 340, et vide infra, p. 604, 5, *in notis*. If it be extended the plaintiff is accountable for all the profits he receives out of the term upon such extent; and if he receives the debt out of such term before it expires, the defendant shall be restored to the term itself; but otherwise he shall keep the term, and not account for the profits of it. Gilb. Exec. 33. 35. We have seen that an equity of redemption cannot be taken in execution, though it be deemed assets; ante, vol. i. 257, note (K), and 349; see also 2 Freem. 115. 2 Atk. 290; and therefore, where the estate is in mortgage, the plaintiff's remedy is by filing a bill in equity to redeem; see ante, vol. i. 237, n. (K).

Ejectment necessary to obtain possession.

It was formerly usual for the sheriff to deliver actual possession of a moiety of the lands; but he now only delivers legal possession: and if the plaintiff do not enter, which it seems he may do by virtue of the *elegit*, he must, in order to obtain actual possession, proceed by ejectment. *Taylor v. Cole*, 3 T. R. 295. Bull. N. P. 104. In a recent case, however, Chief Justice Gibbs said, he had always been of a different opinion; but he would not consider the case then under consideration as deciding the point. See *Rogers v. Pitcher*, 6 Taunt. 206, 7. S. C. 1 Marsh. 542. *Price v. Varney*, 3 Barn. & Cress. 735. S. C. 5 Dow. & Ry. 612. In ejectment under *elegit* an examined copy of the judgment roll, containing the award and return of the inquisition, is evidence of the lessor of the plaintiff's title without proving a copy of the *elegit* and inquisition. *Ramsbottom v. Buckhurst*, 2 Maul. & Selw. 565. See vide *Running Eject.* 330, contra.

Tenant by elegit holds quousque, and must account, when.

When lands are extended under an *elegit*, the creditor holds them "*quousque debitum satisfactum fuerit*;" that is, as a chattel, until the debt recovered, and stated damages are repaid, and no other damages or expences, nor even interest, are allowed, *Fulwood's case*, 4 Co. 67. 2 Inst. 678; and as the annual value of the land extended is ascertained by the inquisition and extent, the time when the debt will be satisfied is certain, and the debtor may re-enter without a previous writ of *scire facias*. *Burwell v. Harwell*, Cro. Car. 598. But as the lands are always extended much below the real value, and as the debtor cannot on a writ of *ad computandum* at law insist on the creditor's doing more than account for the extended value, he is driven for remedy into a court of equity, which, acting on its principle, that he who seeks equity must do

The words "*Cum debitum fuerit recuperatum(k)*," "when debt is recovered," are explained by Sir E. Coke, in his read-
Lord Coke's exposition of this statute.

(k) 2 Inst. 395.

equity, will compel him to pay interest on the debt, although it should exceed the penalty on the judgment, but it estimates the receipts according to the actual proceeds. *Bath v. Bradford*, 2 Ves. sen. 589. *Godfrey v. Watson*, 3 Atk. 517. *Owen v. Griffiths*, Amb. 420. *McClurie v. Dunkin*, 1 East, 486; et vide ante, vol. i. 405, in notis. The debtor cannot, as already observed, by writ *ad computandum* at law, compel the creditor to account for the profits beyond the extended value; yet if by any casual profit the creditor is satisfied his debt, or if part has been levied, and the debtor in court tenders the residue, the debtor may have his writ of *scire facias ad rehabendam terram* to ascertain the accidental profit, and for recovery of the land: but in this latter case the tender must be in court, and of the money actually due, and not an offer to come to an agreement. The debtor may also have a *scire facias*, if he has obtained an acquittance; but a *scire facias* will not lie on a general averment, that the creditor has received his debt by means of the improved value or rental of the land, if the value or rental be improved by the creditor himself; for of that the debtor can take no advantage. 2 Roll. Abr. 483. Bac. Abr. Exec. 708. 2 Inst. 396.

Hitherto, then, the mode of getting back possession of lands taken under an *elegit*, has been by ejectment, by *scire facias ad computandum*, or by application to a court of equity. However, in a late case, the Court of King's Bench referred it to the Master to take an account of the rents and profits of an estate received by the plaintiff who was in possession by virtue of an *elegit*, and ordered that the plaintiff should give up possession, if it appeared that all the monies due to him had been received. The Court observing, that no doubt the Master would allow every thing reasonable, and that if any difficulties occurred in taking the account he would present them to the court. *Price v. Varney*, 3 Barn. & Cress. 733. S. C. 5 Dow. & Ry. 612.

No notice is given of executing an *elegit*, 1 Crompt. 363; and if there be no lands, the sheriff need not return an inquisition, *Stonehouse v. Ewin*, 2 Str. 874; but otherwise an inquisition must be taken and returned, describing the lands with convenient certainty, Moor. 8. Com. Dig. tit. Execution, (C); and after it is taken, the sheriff must deliver a moiety to the plaintiff by metes and bounds. Dalt. Sher. 135. If the defendant hath no lands, and the goods are not sufficient to satisfy the plaintiff, he may have a *capias ad satisfaciendum* after an *elegit*, *Beacon v. Peak*, 1 Str. 226. *Lancaster v. Fielder*, 2 Ld. Raym. 1451; and a void *elegit* or inquisition being as none, it will not prevent the plaintiff from having a new *elegit*, Gilb. Exec. 54: and he may award *elegits* into as many different counties as he pleases, without being under the necessity of suing out *testatums*. 1 Crompt. 346. 352.

It may also be proper to mention, that execution on an *elegit* cannot be sued out after a year and a day without a writ of *scire facias* to revive the judgment, but if a writ has been issued within the year, a different writ of execution may be awarded after the year without a *scire facias*. *Artes v. Hardress*, 1 Stra. 100.

Of other matters relating to writ of *elegit*.

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ing on this statute, to mean "by judgment in an action of debt, or any action wherein damages are recovered."

"*Aut recognitum* (*l*)," or "acknowledged," is expounded by the same author, to mean "by recognizance, acknowledged in any court of record, that hath power to receive the same."

"*Medietatem terræ suæ* (*m*)," is said in the same reading, and agreed by the best authorities to be understood of the half of such *land* (*n*), as the defendant had *at the time* of the judgment given, or of the recognizance acknowledged, unless it be conveyed away by fraud and covin to deceive his creditors, contrary to the statute in that case provided.

And upon these words "*medietatem terræ* (*o*)," the sheriff may extend a lease for years, and the like.

*Moiety of lands
and all goods
may be taken
(x).*

After this statute, upon a judgment given for debt (*p*); or damages in the two courts of record at Westminster, generally the moiety of all the land that the defendant had *tempore redditionis judicii*, or *at any time after*, and all the goods and chattels he had *tempore executionis*, or *the day of the writ awarded*, became subject and liable to the execution.

(*l*) 2 Inst. 395.

(*o*) 2 Inst. 395. [et vide post, 617,

(*m*) Ibid.

in *notis.—Ed.*]

(*n*) Cro. Jac. 451. 42 E. 3. 11.

(*p*) Sheph. Prac. Couns. 305.

42 Ass. pl. 17. 2 H. 4. 14.

*Entirely ex-
tendable by two
judgments.*

(X) But although no more than one moiety can be taken in execution under one judgment, yet it has been decided that a plaintiff, by obtaining two judgments, each of the same date, and by suing a separate execution on each judgment, may take a distinct moiety under each execution, and then, by moieties, have the entirety in execution. *Attorney-Gen. v. Andrew*, Hard. 25. But if one moiety be *already* taken in execution, a second judgment creditor can take but one-fourth, that is, a moiety of the remaining moiety, and so of the like. See *Huyt v. Cogan*, Cro. Eliz. 482. The consequence is, that a third judgment creditor can take but an eighth, and a fourth judgment creditor but a sixteenth part of the estate, when perhaps the first judgment may not be for as many hundreds as the fourth is for thousands. But no well-founded reason appears why such a judgment creditor should be deprived of an adequate remedy for his debt, merely from the circumstance of previous creditors having taken moieties, or other aliquot parts of the estate, for debts infinitely below perhaps the real value and produce of the land.

But it seems that for a debt for which a man had a judgment or recognizance, he was not, by this statute, enabled to have execution against lands in *use* to, or *on trust* for, his debtor; for the statute of Westminster only extended to *lands at the common law* (q).

Stat. of Westminster does not extend to uses or trusts.

It is plain from the construction of the statute of treason, [602] 25 Edw. 3. that the word "lands" did not in a statute include *a use or trust*; for in that statute, the words "lands and tenements" are found, and yet that statute did not extend to *uses and trusts*, which is remedied by the statutes of 33 Hen. 8. cap. 20. and 27 Hen. 8. c. 10 (r).

But the statute 26 Hen. 8. cap. 13. did extend to *uses* (s); because that statute *expressly* enacts, that the offender shall lose all such lands, tenements, and hereditaments, which any such offender shall have of any estate of inheritance *in use* or possession *by any right, title, or means*, which word "*use*," Lord Coke says, was *necessary* to be added, for by the common law, *an use*, which was but *a trust and confidence*, was not forfeited by attainder of treason.

Uses and trusts made liable to execution by

Accordingly, we find in a case, 11 Hen. 7. 23. pl. 10. in which, in trespass, it was pleaded, that one seised in fee, enfeoffed A., B., and C., to the use of himself and his heirs, and afterwards the plaintiff sued execution against the land on a statute merchant. Rede, Justice, said, if this plea be good, it must be by the statute of Richard the 3d of feoffments *to others use*, and this is not in the case of a statute. *stat. Rich. 3d.*

And in another case, 21 Hen. 7. 19 b. pl. 31. on *elegit*, the sheriff returned, that the defendant had nothing in the case, except *an use*. *Et per curiam*, a new *elegit* shall issue against the lands in use. But Broke, in abridging this case, tit. *Elegit*, pl. 11, says, *Et sic vid elegit puis elegit et de terre en use*. *Quære PER QUA LEGE? Videtur per statutum de Richard the 3d.*

Trust lands not assets in equity.

(q) 1 Roll's Abr. 888, pl. 6. S. P. C. 399.

(r) 3 Inst. 19. Hard. 492. Cro. Jac. 513, pl. 23.

(s) Vide *Nevill's case*, 7 Rep. 121.

And in the case of *Pratt v. Colt*, in 21 Car. 2. The plaintiff had a judgment against A., and brought his bill against his heir to subject certain lands, which he had *a decree* of the Court of Chancery for (t), upon *a trust* for his father and his heirs, to satisfy his debt; and the defendant demurred, and the demurrer was allowed. And the Lord Keeper conceived this all one with *Bennet* and *Box's case* (u), in which Lord Chief Justice Hyde, Chief Baron Hales, and Justice Wyndham were of opinion, on hearing counsel on both sides, that *trust* lands (x) were not, nor ought to be deemed as assets in equity.

*Uses and trusts
not subject to
execution at
common law.*

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From the above authorities, it seems clear that *uses* and *trusts* were not subject to executions at common law (y), and the circumstance of the case of the king's debtor being universally, in all the cases where it occurs, considered as a case depending upon prerogative, by which the king was privileged not to lose his debt, *wherever his debtor had either the estate or the profits of the estate*, proves as strongly as a series of adjudged cases would do, that the converse proposition holds as to the subject; to which may be added, the statutes actually made to subject *uses* and *trusts* to the debts and judgment of the pignor of the profits.

*But uses made
so by 1 Rich. 3.
c. 1, now ob-
solete.*

The statute of 1 Richard 3. c. 1. is the first statute which subjected *uses* to an execution upon a judgment (y).

This statute enacted, that every estate, feoffment, gift, release, &c. made or had by any person or persons, and all executions had or made, should be good and effectual to him to whom it was made, against the seller, feoffor, &c. and against all others *having or claiming any title or interest* in the same only to *the use* of the *same* seller, feoffor, donor,

(t) 1 Ch. Ca. 128.

(u) 1 Ch. Ca. 10.

(x) Vide the statute of Frauds,

29 Car. 2. this remedied. [See ante, vol. i. 254.—Ed.]

(y) Hard. 488. 495, 496. 3 Ch. Rep. 20. 11 Rep. 92, 93. Dyer, 160, b.

(Y) *Uses* were first made liable to execution upon a judgment in express terms, by 12 Hen. 7. c. 15; and *trusts*, by 29 Car. 2. c. 3. s. 10.

grantor, &c. or his heirs, *at the time of the bargain and sale, &c.* The statute of 1 Rich. 3. of course became obsolete after the statute of uses, 27 Hen. united the possession and the use.

But the subsequent revival of uses under the name of trusts called for a further interposition of the legislature, and a clause was introduced in the statute of frauds, 29 Car. 2. c. 3. s. 10. [*s. s. ante*, vol. i. 254, n. (I).] which pursues the language of the statute of the 1 Rich. 3. as to uses *in respect of trusts*. It enacts, "that *it shall be lawful* for every sheriff or other officer, to whom any writ or precept is or shall be directed at the suit of any person or persons, of, or for, or upon any judgment, statute, or recognizance thereafter to be made or had, *to do, make, and deliver execution* unto the parties in that behalf suing, of all *such* lands, tenements, rectories, tithes, and other hereditaments, as any *other* person or persons *be*, in any manner or wise, seised or possessed, or thereafter *shall be seised or possessed in trust for him*, against *whom* execution *is so sued*, like as the sheriff or other officer might or ought to have done, if the said person against whom execution thereafter should be so sued, *had been* seised of such lands, &c. of *such* estate, as they *be seised of* in trust for him *at the time of the said execution sued*; which lands, &c. by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person as shall be *so seised or possessed in trust for the person* against whom such execution shall be sued (z)." And if

Execution against trusts revived by the 29 Car. 2. c. 3. s. 10,

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discharged of incumbrances of trustee.

(Z) Whether trust terms attendant on the inheritance are included within this tenth section of the statute of frauds, is a question of great importance to purchasers and mortgagees. The general opinion is, that they are not; because the words of the section plainly refer to trusts of freehold property only, and not to trusts of leaseholds. Leasehold estates are not expressly mentioned; and there are not any words which can appropriately be made to comprehend them. The word "land," is said by Sheppard to denote "*frank-tenement* at the least." Shep. Touch. 92. Technically speaking, therefore, leaseholds cannot be said to be included under the word "lands;" for it must be intended, when the legislature uses legal terms, that it uses them in a legal sense. 3 Madd. Rep. 535. The technical sense of the word "land" is further explained by Sheppard, in his Touch. p. 88, thus:—"If one be seised of some lands in fee, and possessed of other lands for years, all in one parish,

Whether trust terms attendant on inheritance are within the 10th section of stat. of Frauds.

any *cestui que trust* thereafter shall die leaving a trust in fee simple to descend to his heir, then, and in every such case,

and he grant all his lands in that parish (without naming them) in fee simple or for life; by this grant shall pass no more but the lands he hath in fee simple."—So in wills, if a man devise "all his lands," and he have both freeholds and terms for years, the freeholds only will pass, notwithstanding the most liberal interpretation is given to the words of wills. *Rose v. Burtlett*, Cro. Car. 293. *Addis v. Clement*, 2 P. Wms. 458, n. and *Thompson v. Lawley*, 5 Ves. 476, and the cases there cited. This shews the technical sense affixed to the word "land" to be no other than that given to it by the statute itself, namely, an "hereditament," which terms for years are not. Neither can the word "tenement," as used by the statute, be said to include a term for years, much less can "rectories, tithes, and other hereditaments." These latter words, "and other hereditaments," shew the nature of the preceding interests alluded to, and affix the usual technical sense to the words "lands and tenements," viz. such as are *ejusdem generis* and inheritable, which leaseholds and terms attendant are not. The word "seised" too is applicable only to freehold estates; and though the word "possessed" may refer to leaseholds, yet there is no property of that description previously mentioned to which it can have reference.

Reasons for excluding them from this section of statute, continued.

Another reason against including terms for years in this section of the statute may be drawn from a consideration of the consequence of supposing them included. If trust terms are held to be comprehended within this tenth section, then an estate in fee simple, with an attendant term annexed, would, in reference to the judgment creditor, be reduced to a level with chattel interests. For example, if A. be seised of an estate in fee simple, with a term outstanding in his own trustee attendant on the inheritance, then a judgment creditor might, under the statute, extend and sell the whole of the term for the debt of the *cestui que trust*, which would in fact be a virtual sale of the entire estate for the whole beneficial interest therein; when, if there had not been an attendant term, the creditor could have taken but a moiety of the land only under an *elegit*. The numerous titles therefore which are now dependant on terms for years for protection, instead of being the most safe, would become the most insecure and unmarketable titles in the kingdom, and all the laudable anxiety which is now displayed on the part of a purchaser to procure an assignment of the term to attend the inheritance, would be transferred to the object of obtaining a merger of the term, and by that means to relieve one moiety of the lands from judgment debts, since the lands would be then wholly freehold and extendible for one moiety only. But this section of the statute was never meant to include trusts of leaseholds of any kind; for otherwise they would have been expressly introduced, and not left to the mere conjecture of a single judge, whether they should be comprehended in the statute or not. It is scarcely to be conceived, if trust terms were intended to have been included within the statute, that the framers of the act, acquainted as they were with the nature and qualities of terms for years, and of their capacity of being converted into trusts, would have taken so little notice of them, as to have alluded to them by the word "possessed" only—a vague-

such trust shall be deemed and taken assets by descent, and the heir shall be liable and chargeable with the obligation of

ness of expression implying more carelessness than in common fairness can be imputed to the wording of this statute. See Evans's notes to this statute, vol. i. p. 235.

On the whole therefore we may conclude, that trust terms attendant on the inheritance are not within the tenth section of the statute of frauds, and consequently that they are not liable to be taken in execution by the judgment creditor; and this conclusion is fortified by the decisions mentioned in a former page; see ante, vol. i. p. 235, where authority is adduced for the position, that neither an equity of redemption, nor equitable interests of any kind, engrafted on the legal estate of leasehold property or terms for years, can be taken in execution by the judgment creditor for the debt of the *cestui que trust*; and if a trust of a term in gross be not liable to be taken in execution under the tenth section of the statute of frauds, and if a term assigned in trust to attend the inheritance be a trust of a term in gross, the logical inference is, that a term assigned to attend the inheritance will not be subject to be taken in execution under the tenth section of the statute of frauds. Indeed there would be little occasion to produce reasons why trusts of terms attendant on the inheritance should not be exempt from the liability of attachment by the judgment creditor as well as trusts on terms in gross, if in a late case (*Doe v. Hilder*, 2 Barn. & Ald. 787, cited ante, vol. i. p. 503, n. (A)), it had not been made a question whether the tenth section of the statute of frauds, which subjects trust estates of freehold property to the judgment debts of the *cestui que trust*, did not also include satisfied terms for years assigned to trustees to attend the inheritance? No decision on the point has yet been reported. The only ground which would support a decision in favor of the judgment creditor would be, that of considering the term as so annexed to, and attendant on the inheritance, that it is deemed for many purposes as part of it; but this ground, it is conceived, must yield to the force of the preceding arguments.

Concluded that trusts of terms are not within 29 Car. 2. c. 3. s. 10.

Presuming then that trusts of attendant terms, as well as trusts of all other leasehold estates, are not affected by this tenth section of the statute of frauds, it may not be amiss in the next place to inquire how this species of trust stood in regard to judgment creditors previously to the passing of that act. At common law, prior to the statute of Westm. the goods and chattels of the debtor were the only funds liable to the claims of the judgment creditor, and there seems no reason to doubt that chattels real, such as leaseholds and other terms for years, fell within the words "goods and chattels," and constituted a fund, when possessed by the debtor, for the satisfaction of the judgment debt, by means of a writ of *fiery facias*. Then came the statute of Westm. and empowered the sheriff to deliver to the judgment creditor all the chattels of the debtor, saving only his oxen and beasts of his plough, and the one half of his land (*medietatem terræ suæ*), until the debt be levied upon a reasonable price or extent. As against terms for years and all other chattels of the debtor, the creditor, it is observable, did not require the assistance of this statute, because, prior to that statute, he could have sold and made the most of such terms and chattels under a writ of *fiery facias*. And Lord Coke,

Judgment creditor may sell term in legal possession of debtor under fiery facias,

his ancestors for or by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession, in like manner *as the trust descended*; "any law, custom, or usage to the contrary in anywise notwithstanding."

Lands in trust conveyed away between judg-

Now, as the liability of lands held in trust to an execution upon a judgment against the *cestui que trust*, depends upon the

or extend moiety of it under elegit.

when he says, that by the words "*medietatem terræ suæ*" the sheriff may under the *elegit* extend a term of years, might possibly have not recollected, that he was thereby giving the creditor a worse remedy than he enjoyed before at common law. At common law he might have taken the whole lease or term, but under the *elegit* a moiety only. On the authority however of Lord Coke's doctrine, and *Fleetwood's case*, 8 Co. 171 (where it was said that the creditor had the option of either extending or selling the term) Mr. Serjeant Williams, in his valuable notes to 2 Saund. Rep. 68 a, seems to consider it settled, that the sheriff might extend a moiety of the term, or sell the whole as part of the personal estate to the plaintiff, at a gross price appraised by the jury.

But though he sue elegit, lien of judgment; does not attach till execution.

But although a moiety of lands held for a term of years may be extended under an *elegit*, yet the command to the sheriff does not bind the land so as to over-reach the sale, in the same manner as it does in the case of a freehold estate. This distinction appears to have been expressly taken in *Fleetwood's case*, *ubi supra*, where it was held, that a leasehold for years may be extended on an *elegit* if it is in the possession of the defendant at the time execution is awarded. Mr. Serjeant Hill gave an opinion, that the creditor had a right to sue an *elegit*, and that on an extent sued, the title of the judgment creditor would (as in the case of freehold lands) have relation to the time when the judgment was docketed. On the other hand, Mr. Butler thought the word "goods" in the tenth section of the statute of frauds, did comprise leaseholds, which therefore were not bound until delivery to the sheriff of the writ of execution. And this, on the authority of *Fleetwood's case*, may be pronounced to be the correct statement of the law. Mr. Serjeant Hill's opinion has never been followed in practice.

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Account of judgment creditor in possession.

On the subject of judgments, it may not be amiss to mention the case of *Williams v. Price*, 1 Sim. & Stn. 587, the question in which was, what degree of diligence a creditor accepting from his debtor, by way of collateral security, the assignment of a judgment recovered by that debtor against a stranger, was bound to use for the purpose of enforcing satisfaction of that judgment. His Honor however would not enter into that question largely, as the creditor, in the case before him, had recovered possession by suing out execution; and therefore, in referring it to a master to take an account of what the creditor had received or might have received without his wilful default or neglect in respect of this judgment, his Honor thought that he should in truth be following the authority of *Mure, Ex parte*, 2 Cox, 63, without adopting all the principles of that case. 1 Sim. & Stn. 587.

power vested in the sheriff, by the section of the statute of frauds last-mentioned, it seems it *must be confined* within *such limits* as the statute has prescribed *to the execution of the power*; and as the power is *cautiously* confined "to do, make, and deliver execution unto the party in that behalf suing, of all *such* lands, tenements, &c. as any other person or persons *be* in any manner or wise seised or possessed of in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the same person against whom execution thereafter should be so sued, had been seised of the lands, &c. of such estate, as *they be seised of* in trust for him *at the time of the said execution sued*," it is apprehended that no execution can attach under this act, except on lands of which another person or persons *be seised or possessed in trust for the person against whom execution is sued* AT THE TIME of the said execution sued.

ment and execution, cannot be followed (A).

Thus where A. seised of lands in fee, conveyed them in Same. October, 1682, in consideration of 1270*l.* to B. and his heirs, who was only a trustee for C. and his wife and their heirs. And, by indenture, in December, 1682, between B. of the one part, and C. and E. his wife, and their son D. on the other part, it was agreed (x) that B. should stand seised of the premises to the intent that C. and his wife should take 40*l.* a-year for their lives, and that the rest of the profits should be paid to D. and the heirs of his body. The lessor of the plaintiff in ejectment, in Trin. Term, 1695, recovered judgment against D. on a bond. In July, 1699, E. and D. borrowed 600*l.* of G. the defendant, and for a security B., by their direction,

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(x) *Hunt v. Coles*, Com. Rep. 226. [Principle acknowledged per Hardwicke, C. in 2 Atk. 107, and so stated by Comyns, C. B. who argued and reported the case. Com. Dig. Execution, C. 14. But some text writers treat this case, as of dubious authority, see Gilb. U. by Sug. 77, n. and Sug. V. & Pur. 401), but without much reason as it should seem.—Ed.]

(A) It follows therefore, that a purchaser for a valuable consideration and without notice, obtaining a conveyance of the legal estate from the trustee, and of the equitable interest from the *cestui que trust*, will not be bound by a judgment previously entered up against the *cestui que trust*, upon which no writ of execution shall have been sued.

How judgment may be avoided where the legal estate is in trustee.

mortgaged the premises to the defendant for 500 years. The lessor of the plaintiff in 1714 obtained judgment on a *scire facias* upon the first judgment, and upon this took out execution by *elegit*; and the sheriff, after an inquisition which found that D. was seised in fee, extended one moiety, and delivered it to the lessor of the plaintiff: and the doubt was if he had any title by the statute 29 Car. 2. c. 3. And after argument by Sir Constantine Phipps on one side, and Sir Edward Northey on the other, it was determined by Mr. Justice Tracey that the execution was not good; for the words *at the time of the execution sued* referred to the *seisin* of the trustee, and therefore if the trustee had conveyed the lands before execution sued, *though he was seised* in trust for the defendant *at the time of the judgment*, the lands could not be taken in execution. And Sir Edward Northey said, that *ever since* the act *such construction* had been thought agreeable to the statute, though he did not know it had ever been judicially determined. And a case was mentioned by Mr. Justice Tracey from Serjeant Cheshire's notes, where this opinion seemed to be allowed by Lord Trevor, and was not contradicted by the court.

Express notice of judgments immaterial, if lands are held in trust for vendor and conveyance is executed before execution awarded (B).

Now, since according to the *express* letter and *judicial* construction of this statute, lands held in trust are only liable to execution on judgments, where the trustee *is* seised or possessed of them *at the time of the execution sued*, it seems to follow as a *necessary consequence*, that where lands are *in the hands of a trustee* at the time of the sale and conveyance by

Doctrine in text doubted.

(B) This is never relied on in practice. A purchaser is always advised to require satisfaction of the judgment to be entered on the records of the court. The maxim on which this doctrine is founded, namely, that equity follows the law is not universal; for equity in one sense rather corrects and softens the law than follows it; and where rules of equity are opposed to rules of law, the latter must yield to the former. Notice takes away the analogy. The cases at law and in equity are not the same where there is notice. At law it is immaterial whether the party have notice or not. But in the Court of Chancery notice affects the conscience of the party, and a person having notice comes in with inferior equity to the person of whose claim or lien he is informed; and although the purchaser or mortgagee may have the legal estate, yet he has not equal equity, which in similar cases has always been held sufficient to postpone him. The doctrine of the learned author, it is true, receives some support from the circumstance, that not a single instance can

the cestui que trust, notice of judgments against the cestui que trust is immaterial to the title of the purchaser; for judgments are not specific liens upon lands held in trust, such lands are merely liable to execution in the seisin or possession of the trustee of a person beneficially entitled at the time of execution sued out. The statute of frauds has merely invested the sheriff with a power to make and deliver execution unto the party suing, of lands, &c. of which a trustee is actually seized or possessed in trust for him against whom execution is sued at the time of execution sued. If the trust determines before execution sued out, such lands are not liable at law, and consequently not in equity, for equity follows the law; and at common law we have seen, that lands in use, or in trust, were not liable to judgments, and they are not subject to execution on a judgment by statute law, unless the trustee of the person against whom execution is sued be seised or possessed thereof at the time of the execution sued out. It is perfectly clear that an elegit could not be executed upon a trust estate, sold and conveyed to the purchaser, either by the common law or under the statute; if such lands therefore were liable to a judgment, it must be through the medium of a court of equity by bill for relief, and to subject the lands to the debt in the hands of the purchaser: but there is no ground for equity to give such relief, because the object, in respect of which relief is asked, is not such as a judgment attaches upon as a lien at law or in equity. If the subject were liable at law to the execution but protected by equity, such court might and does daily give relief; but the subject is not protected from the execution by

Judgment not a lien on trust estate either in law or equity.

be found in the reports where a contrary doctrine has been holden or even advanced, notwithstanding it is a case that must have frequently occurred. But granting the utmost force of that argument, still a purchaser or mortgagee having actual notice of the judgment, can never be advised to forego the usual requisition of demanding satisfaction to be entered on the records of the court, or requiring an adequate indemnity from the vendor, and when necessary from his surety also. It is necessary to remind the student (what perhaps he might from the preceding observations otherwise confound), that, generally speaking, trust estates are liable to execution, though in the particular instance stated, that rule may be circumvented without any relief in equity; and note, an equity of redemption cannot be taken in execution for a judgment debt. See ante, vol. i. 257; also, pages 563 and 627.

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equity, but is in itself *not the object of an execution*, having passed out of the seisin and possession of the trustee *before execution sued out* into the hands of a purchaser. In this respect it resembles stock or a legacy, neither of which a court of equity will pursue under an execution by way of relief, because they are *not the objects* of an execution *at law*. Therefore when a purchaser takes an estate from a *cestui que trust* and his trustee, *before execution awarded* against such *cestui que trust* on a judgment, he thereby acquires that which is *not the subject of an execution* on a judgment against the person of whom he purchased *at law*, nor consequently *in equity*, and then notice of the judgment cannot be material, since that judgment ceases to attach upon the property, *if it be not* in the seisin or possession of the trustee of him against whom execution is sued out, *at the time when execution is sued out*.

Leaseholds affected from time fieri facias is lodged with sheriff.

The cases and authorities to which we have last referred, relate to *trusts* of the freehold and inheritance; but it is apprehended that the same principle is applicable to leasehold or chattel trusts, whether we consider them as subject to execution at common law, or under the statutes of Westminster or of frauds; for it seems perfectly clear that execution could only be had of the goods and chattels which the debtor *had tempore executionis*, or the day of the writ awarded, or rather *at the time it is lodged in the sheriff's hands* (a) (c).

(a) 3 Atk. 739.

Lien of judgment attaches on leaseholds, when.

(C) This is now considered as settled law. Lord Hardwicke said, a leasehold estate is affected by an *elegit* or *feri facias*, from the time it is lodged in the sheriff's hands. *Burden v. Kennedy*, 3 Atk. 738, cited ante, vol. i. p. 281. It is incumbent therefore on the purchaser of a leasehold estate to ascertain that no execution has been delivered to the sheriff; but as the sheriff will not in many instances, permit his office to be searched, this information can only be obtained by inquiring in the proper courts whether any judgments against the vendor have been recovered. As to an *elegit* of leasehold property, if a creditor is induced to relinquish his right of selling the whole leasehold estate under a *feri facias* (which, from the state of the market or other causes he foresees, would be extremely prejudicial to his debtor), and sues out an *elegit* instead of a *feri facias*, the better opinion seems to be, that the general lien of the judgment will not specifically attach on the leasehold estate until the creditor has recovered possession by means of a judgment in ejectment. The reasons for this opinion have been stated at the latter end of a former

And it appears that courts of equity have governed themselves by this rule in cases, where they have interposed to subject property of *this* nature, under the jurisdiction and influence of such courts, to execution. *Same in equity.*

Thus, in the case of *Angell v. Draper* (b), the bill was, that the plaintiff had obtained judgment against T. S., for 100*l.* and that the defendant, under the pretence of a debt due to himself, and to prevent the plaintiff's having the benefit of his judgment, had got goods of J. S. of great value into his hands, sufficient to satisfy his debt, with a great overplus, and prayed an account and discovery of these goods. The defendant because that the plaintiff had not alleged that he had sued out execution, and had actually taken out a *fiery facias*; for, until he had so done, the goods were not bound by the judgment, nor the plaintiff entitled to a discovery or account thereof. *Et per curiam*, allow the demurrer: the plaintiff ought *actually to have sued out execution* before he had brought this bill. *Judgment creditor, before he can redeem leasehold in equity, must sue out execution at law.*

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So in the case of *Shirley v. Watts* (c), in which a judgment creditor, who had not taken out execution, brought a bill against the defendant to redeem him, who was a mortgagee of the leasehold estate. The Master of the Rolls (Sir William Fortescue) said, the case last stated was a stronger than this, because there seemed to be fraud. In the present case there was not the least suggestion of fraud, the defendant being a fair and *bonâ fide* creditor by mortgage. There was a case of *King v. Marshall*, last Term, upon a bill by a judgment creditor to redeem, which came on before Lord Hardwicke, *when he asked for the writ of execution*; and, upon its being produced, admitted the judgment creditor, for this reason, to redeem. For want of its being taken out now, the bill must be dismissed, because *For till execution plaintiff has no lien on leasehold estate.*

(b) 1 Vern. 399.

(c) 3 Atk. 200. [S. C. ante, vol. i. 281, *quod vide*.—Ed.]

note, see ante, 604, 5, 6, n. (Z), to which reference is made for more, both on that subject and on judgments in general.

till execution, the plaintiff has no *lien* on the leasehold estate, and decreed accordingly.

Observation on two preceding cases.

The reader will no doubt have observed, that in the cases of *Angell v. Draper*, and *Shirley v. Watts* last stated, the plaintiffs were unable to enforce their executions at law against the goods in the one case, and the leasehold estate in the other, the same being hypothecated or pledged, and redeemable only by the interposition of a court of equity. It was therefore necessary to apply to a court of equity, on the common equity among creditors of redeeming each other; but though the court admitted the right to redeem, it was clearly held, *in both instances*, that the plaintiffs, in order to entitle themselves to the interposition of the court, must sue out execution, that is, they must first entitle themselves to an execution *at law*, and it was admitted, that when that was done, they would then be entitled to the equitable interposition of the court, to enable them to redeem these chattels, which, beyond the lien of the mortgagees thereon, were the proper subjects of an execution at law, and only protected by the predicament in which they stood from that execution, without the interposition of a court of equity.

No execution of trust of term not in debtor at time of writ awarded.

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If these observations are well founded, it is apprehended that the sheriff cannot, at law, execute a judgment upon a term of years held in trust, unless it be held in trust for the person against whom execution is sued out, *at the time of the writ awarded*; and that if it be necessary to go into a court of equity to assist such execution against a trust estate, the plaintiff in equity must first place himself in that situation which entitles him to execution at law, independent of the equitable predicament in which the object of his execution happens to be placed, and then his success will depend upon shewing that he is entitled to the equity, which he prays by his bill (D).

Lien of judgments, as to debtor, on his freehold and leasehold estates.

(D) The lien of judgments may be considered, 1st. as it regards the owner, and then 2dly. as it regards a purchaser. As to the owner, a court of equity will never allow him to take shelter under a legal title or other technicality, for the purpose of avoiding his own incumbrance; and therefore, in whatever way

the *cestui que trust* may be entitled to the benefit of the term, it will not in equity be allowed to protect him from his own judgment, whilst it will be allowed to protect him and all third persons who have no notice, from judgments and incumbrances not their own, provided such legal estate be created in point of time prior to the period when the lien of the judgments or other incumbrances attached on the estate. And as before the statute of frauds, a court of equity would relieve the incumbrancer from a conveyance to trustees created *mala conscientia* for the very purpose of avoiding the debtor's own judgment, by removing the legal estate so placed in trustees out of the way of the judgment creditor, there appears no reason why the same equity should not still be administered; for the statute has not altered the case, and it is certainly contrary to all equity, that a debtor should retain in his own hands the means of circumventing the perhaps only productive remedy which may remain to his creditor, and there are many instances, where a conveyance to trustees would not be fraudulent within the statute of 13 Eliz. c. 5. (according to the interpretation that statute has received) which conveyance would, nevertheless, be sufficient to debar the creditor and incumbrancer from all remedy for his debt or lien; and this relief in equity must have been afforded not only against trusts of freehold, but also against trusts of chattel interests or terms for years, such interests being capable of ownership, and consequently of being clothed with a trust by transfer from one owner to another. This latter doctrine is the more material now, as trusts of terms for years, we have seen, are not within the 10th sect. of the statute of frauds, vide ante, 604, n. (Z). The mode of relief afforded the creditor was, by permitting him to sue out his *elegit* against the inheritance, as if the term or legal estate were merged, and the inheritance brought into possession. But equity, though it removed the term or legal estate out of the way of the creditor as against the debtor himself, considered it still in existence in favor of a *bona fide* purchaser or mortgagee, to protect them from debts and incumbrances not their own; and, therefore, there is still a difficulty in the way of relief to a judgment creditor against a conveyance to trustees, where a purchaser or mortgagee has subsequently acquired the legal estate without notice, because such a purchaser or mortgagee has equal equity with the judgment creditor and the legal estate also, and that difficulty is considerably augmented by the circumstance, that no case is to be found in the books where such relief has been granted.

2dly. As it regards a purchaser:—Purchasers of the inheritance are divisible into four general classes, 1st. where the whole legal estate is in the vendor; 2d. where the whole legal estate is outstanding in a trustee for the vendor; 3d. where the legal reversion is in the vendor, and a long satisfied term is outstanding in a trustee for him to attend the inheritance; and 4th. where the legal term is in the vendor and the reversion in fee outstanding in a trustee for him. On the first class, the judgment attaches from the time it is docketed by the 4 & 5 W. & M. c. 20, and nothing can affect or defeat it; see ante, vol. i. p. 273, note (O). On the second class the judgment attaches only from the time of execution sued. *Hunt v. Coles*, ante, 606 a. In the third case, the judgment will attach on the reversion from the time it is docketed but not on the term, provided it be created prior in time to the docketing of the judgment, for the trust of the term, we have seen, is not within the 10th

Lien of judgments when estate is in possession of mortgagee on purchaser.

Terms for years, different kinds.

Chattels real, or terms for years, are of two kinds (E).

First, terms in gross.

Secondly, terms attendant upon the inheritance.

Terms attendant upon the inheritance may again be divided into two kinds.

First, Terms, the purposes of whose creation are answered, and which attend the inheritance by presumption of equity.

Secondly, Terms, the purposes of whose creation are answered, and which have been expressly assigned to attend the inheritance.

Terms in gross.

1st. As to terms in gross, or Terms, the purposes of whose creation are not answered, but which are in the condition of bearing fruits, it seems not to admit of a doubt, but that the reversioner or remainder-man, expectant upon the determination of such terms, has, during that state of fructification, no greater or other interest therein, than a mere right to redeem them, on fulfilling the purposes of their creation. Such terms, therefore, are not subject to an execution at common law, on a judgment against the reversioner or remainder-man of the inheritance; because at law we have seen they are considered as separate from the inheritance, and as a distinct and different species of property, the law taking no notice of any ownership distinct from the legal estate; and that they are not liable to an execution, under the statute of

Terms in gross not liable to execution on judgment against reversioner (F).

section of the statute of frauds, and consequently the purchaser or mortgagee may protect himself under the term even if he have notice of the judgment; see *vide* what is said as to the point of notice, ante, p. 607, *in notis*. In the fourth case, the creditor may sell the legal term in his debtor as a chattel under a *fi. facias*, for the debtor has both the legal estate and the beneficial interest in the term, by means of a secondary trust in his favor; and it must be supposed, that the law being so far known to him, he intended by taking the legal estate of the term himself, to subject the term to the lien of his creditor.

(E) See ante, vol. i. 457.

(F) But the reversion of itself may, it seems, be taken in execution, see ante, vol. i. p. 257, note (K), and post, 631.

frauds, seems a necessary consequence from the decision in the case of *Lyster v. Dolland* (*d*), by which it was determined, that the equity of redemption of a mortgage term, is not within that clause of the statute of frauds which relates to judgments. Such terms, therefore, are only subjected to judgments in equity, by virtue of the equity which permits subsequent incumbrances, and creditors to stand in the place [613] of their debtors, and by redeeming prior incumbrances upon their property, lay it open to an execution, which such court will aid.

2dly. As to terms, the purposes of whose creation are answered, but which have not been assigned to attend the inheritance, their liability will, it seems, depend on the kind of connection or relation there is between the ownership of such term, and of the inheritance, that forms their union in equity, or gives the former the quality or capacity of being considered as attendant upon the latter. *Attendant terms.*

Now, we have seen (*e*), that the connection or relation that subsists between the ownership of such term, and of the inheritance which forms their union in equity, or gives the former the quality or capacity of being considered as attendant upon the latter, where no trust is declared for that purpose, is merely by construction in equity, founded upon the conclusion, that such attendancy is convenient and desirable for the protection of real estates, and to keep them in a right channel, by which means the dominion of them is preserved entire. *Principle of attendancy.*

But it has been observed (*f*), that the owner may prevent the constructive coalition of the terms and inheritance, if (for any particular purposes) he thinks fit to do so, and keep them as distinct as they were at the creation of the term, by declaring his intention to be so; for such coalition is merely by construction in equity, upon a presumed acquiescence of the owner of the inheritance to that which *prima facie*, appears most for his benefit. But such declaration precludes all *No constructive attendancy against express declaration.*

(*d*) Ante, vol. i. 254; et vide 1 Ves. jura. 431, and 3 Bro. C. C. 478. 480.

(*e*) Ante, vol. i. 459.

(*f*) Ante, vol. i. 465. 468.

ground for construction in equity, and puts the matter entirely upon the footing of the option of the owner, which he certainly has a right to make, as incident to his property and ownership; whether his option is more or less convenient in the end, than that which equity would have presumed for him, is immaterial, for *quilibet potest renunciare juri pro se introducto*.

Purchaser bona fide taking in satisfied and unassigned term, protected against judgment of which he has notice. Semb.

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Now if it be admitted, that the union of the term, and the inheritance in these cases, depends upon the acquiescence of the owner (as it is presumed this must be admitted, because equity, which aims to effectuate, will never make a construction contrary to the declared intent of the parties interested); and if it be likewise admitted, that a trust estate is only liable to execution in the hands of a trustee, at the time of execution awarded, then it seems to follow as a necessary consequence, that the reversioner or remainder-man, expectant on the determination of such terms, together with his trustee, may alien such terms absolutely independent of the inheritance, and that the purchaser thereof will be entitled thereto; and that such terms in the hands of the alienee, will not be subject to an execution, on a judgment against the *cestui que trust*: now if that would be the case, if such terms were aliened for a valuable consideration, separate and distinct from the inheritance, there appears to be no reason why a purchaser for a valuable consideration of such term, and also of the inheritance, should not be protected during the continuance of the term from a judgment, whether he purchased *with or without notice*; because, as to the term, he has purchased a subject, not liable to execution on a judgment at common law, or under the statute of frauds; and there seems to be no equity to induce a court of equity to subject such term in the hands of, or held in trust for, a purchaser for a valuable consideration, to a judgment against the vendor, such judgment being no lien thereon, either at common law, or under the statute of frauds: and as such term is perfectly under the direction of the owner, it seems, that if the owner directs it to flow in the channel in which the inheritance is limited by the purchaser's deed, it will become consolidated with, and part of, that inheritance so limited, not so as to merge and extinguish.

in that inheritance, but so as to continue the benefit of the term to the alienee of the inheritance.

When a judgment creditor takes out execution against a remainder-man, or reversioner expectant upon a term for years resulting, or in mortgage, or in gross bearing fruits, and finds himself impeded by such term, there appears to be an obvious equity in his favor to entitle him to apply to a court of equity, to subject the term to his execution, he redeeming the mortgage or discharging the demands upon it; because in such case, the execution against the term is prevented merely by subsisting trusts with which it is bound, which being discharged, it becomes a trust for him against whom execution is awarded at the time of the writ awarded, and, consequently an equity arises under the statute of frauds, to subject the term, beyond the charge thereon, to the execution. But if the term be parted with by the person against whom the execution is used, before execution awarded, so that such term ceases to be the object of an execution at law, where is the superior equity of a judgment creditor to better his case in equity, or to give him any remedy against a purchaser for a valuable consideration, with or without notice, that he has not at law, or under the statute, or to change the right of parties. Why should equity go further than the law? I know of no instance in which it does so. Equity in such case ought to follow the law, and as the plaintiff in judgment could not extend the land in the possession of the assignee of the term holding beneficially, so neither ought he to extend it when he holds in trust for a purchaser of the inheritance. Such term is not shielded against an execution by the interposition of a trust between it and the legal owner, in which cases equity withdraws its protection, but it has ceased to be subject to such execution, having become the property of a purchaser for a valuable consideration, before the judgment creditor had gained a lien thereon by taking out execution.

Term never assigned to attend, removed in equity out of judgment creditor's way as against owner, but not as against purchaser even with notice.

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3dly. As to terms, the purposes of whose creation are answered, and which have been expressly assigned to attend the inheritance. It seems reasonable that such terms should not be considered as an obstacle to the execution of judgments

Purchaser with notice not protected by attendant term. Sed accis as to term never as-

signed to attend. Semb.

against the inheritance, when held in trust for a person who is affected with actual notice; because a trust of a term, which is by express declaration attendant upon the inheritance, is of the same nature with the inheritance. It is a shadow, an accessory to it, for otherwise it could not be attendant upon it. Such a term, and the inheritance on which it is attendant, become consolidated. Such term, therefore, goes with the fee, and is the inheritance itself. Therefore the trustees thereof may be considered as trustees for all incumbrances subsisting on that inheritance, upon which it is attendant, and, consequently, for creditors by judgment pending its attendancy, unless it be in the case of an intermediate purchaser *without notice*, in which case a court of equity will sever such term from the inheritance. And if this be a just view of the nature of a term, attendant by express declaration on the inheritance, it will follow of course, that whoever takes of such trustee an assignment of such term, with express notice of a judgment pending its attendance, takes in truth to that extent, an assignment of a trust estate, with notice of a trust, and, consequently, takes subject to the trust of which he has notice (a).

Doctrine in trust questioned.

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(G) A distinction is here made between the protection afforded by a term assigned on an express trust to attend the inheritance, and the protection afforded by a term attendant by construction in equity only, and the latter species of term is considered as having a greater protective quality than the former, inasmuch as it will defend a purchaser even with notice from the attacks of the judgment creditor. The argument inducing this conclusion depends entirely on the difference which the learned author supposes to exist between the two terms. He considers the one till actually assigned as a term in gross, with all the attributes of that species of term; and the other as an attendant term, with even less qualities than it really possesses. He views the legal operation of the term attendant by construction in equity, without any of its equitable incidents, and the equitable operation of the term expressly assigned to attend the inheritance, without any of its legal effect. The consequence is, that the legal consideration of the one term is opposed to the equitable consideration of the other. But if in the instance of a term expressly assigned to attend the inheritance, a court of equity will relieve against the maxim at law, "that every term is a term in gross," where the purchaser has notice of the judgment or incumbrance (though in other cases where the purchaser has no such notice, it will permit that maxim to prevail); then in the instance put by the learned author, of a term never actually assigned to attend the inheritance, but which is nevertheless attendant by implication in equity, and in fact an attendant term for every purpose,—why should the

To resume our attention to the subject of notice.

court depart from its rule, and hold, that a purchaser even with notice shall, in such a case, be permitted to avail himself of the maxim at law, that every term is a term in gross?

It is submitted in derogation of the argument suggested by the learned author, 1st, that meeting him on his own ground, there is no material difference between a term expressly assigned to attend the inheritance and a term attendant by construction in equity; and, 2dly, that supposing his doctrine correct, it would tend to subvert the original and elementary principles of the Court of Chancery, in regard to notice in general. *On two grounds.*

Terms for years became first attendant on the inheritance solely by construction in equity. The practice of declaring them so attendant, expressly by writing, was an after invention, merely declaratory in so many words of the rule of court; and was, and still is, so far as the attendant quality of the term is concerned, mere surplusage. The term would equally attend and protect the inheritance, as well without an express declaration as with it. The rule in equity is, that when the trusts of the term are satisfied, and the particular purposes for which it was raised, answered, and there is no proviso of cesser annexed to its original creation, the term shall thenceforth become attendant on the inheritance. *Best v. Stampford*, Pre. Ch. 252. S. C. 2 Freem. 288. This rule is *inter leges non scriptas* of the Court of Chancery. One of the earliest cases wherein it is alluded to is, that of *The Attorney-General v. Sands*, 3 Ch. Rep. 37, a case determined eight years previously to the passing the statute of frauds. And even then, express declarations in writing were not uncommon, as may be inferred from the remarks of Sir Matthew Hale, in *Marak v. Lee*, 1 Ch. Ca. 162. 166, and 2 Vent. 337,—a case determined about a year afterwards, and seven years before the statute of frauds, where the doctrine of attendant terms, both by express declaration and construction in equity, is treated with a familiarity which implies, that it was long ere then placed among the settled rules of the court. The 7th section of the statute of frauds declared, that all trusts should be in writing, but the succeeding section expressly exempted constructive trusts from the operation of the act; and certain it is, that courts of equity still continue to treat a term for years, the trusts of which have been satisfied, as attendant on the inheritance without any writing to that effect, and will compel the trustee to assign it as the owner of the inheritance shall appoint. If, therefore, says Mr. Gream Hall, in a late ingenious pamphlet, p. 28. "It appears that trust terms were, at the time the statute was passed, and long before, attendant upon the inheritance by construction of equity, and continue to be so construed at this day; and that all terms which exist in this state and are available against dormant incumbrances, were first made attendant by such equitable construction and not by express declaration, and that such express declaration although useful, is not absolutely necessary even at this day, to make them attendant; it may be fairly contended, that they are in effect and character, mere constructive trusts, so long as they continue attendant." In what particular does a term attendant by construction in equity, differ in point of character and actual benefit to the purchaser or mortgagee, from a term expressly assigned to attend the inheritance; but that in the latter in-

No material difference between term expressly assigned, and term attendant by implication in equity.

Decree not
notice of matters
disputed.

A decree made in court of equity is not implied notice to

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Nothing can
destroy effect
of actual no-
tice.

stance, the trusts of the term which arise under the rule in equity, have been embodied in so many words? The latter term is precisely what equity had made it before any written description of it occurred, and does not lose its character by being described in writing. It should consequently follow, that the operation of a term expressly assigned to attend the inheritance, should be equally potent in regard to notice, with the effect of a term attendant by construction in equity merely; but the learned author has denied this of the first species of term, and if the second be in character and effect exactly similar, the necessary conclusion is, that the constructively attendant term, will not have any greater power in reference to the subject under discussion, than the term expressly assigned to wait on the inheritance. The distinction then having failed whereon the argument in the text is founded, the deduction drawn from it must also, it is submitted, fall to the ground. But,

2dly. The doctrine, that a purchaser *bonâ fide* with notice of a judgment may, by procuring in a satisfied but unassigned term to attend the inheritance, over-reach the lien of the judgment creditor, is a doctrine which, if admitted, diametrically contravenes other doctrines of the court, equally well settled and acknowledged. Thus, if a first mortgagee make further advances after notice of intervening incumbrances, he will not be permitted to tack them to his mortgage, ante, vol. i. 528. So where there was a mortgage for securing all further advances of which a second mortgagee had notice, and the second mortgagee filed a bill to redeem without paying advances made after his mortgage; Lord Cowper dismissed the bill, saying, *it was the folly of the second mortgagee with notice to take such a security*, ante, vol. i. 545. In like manner, Lord Hardwicke said, in *Mead v. Orrery*, 3 Atk. 238.—“Now to be sure, notice in a court of equity is extremely material; for if a person will purchase with notice of another’s right, his giving a consideration will not avail him, for he throws away his money voluntarily, and of his own free will?” The same noble and learned Lord in another case observed, that the taking of a legal estate after notice of a prior right made the party a *mala fide* purchaser; for he knew the first purchaser had the clear right to the estate; and, after knowing that, he took away the right of another person by getting the legal estate; and his Lordship added,—“Now, if a person does not stop his hands, but gets the legal estate when he knows the right in equity is in another, *machinator ad circumveniendum*, Dig. lib. 4. tit. 3. *Lex* 2; and it is a maxim too in our law, that *fraus et dolus nemini patrocinari debent*, 3 Rep. 78 b.” *Le Neve v. Le Neve*, 3 Atk. 654. On this latter principle, therefore, it is submitted, that the doctrine in the text cannot be maintained; for in all cases where a party has express or implied notice he comes in fraudulently, and even if he has the good fortune to obtain a prior legal term or estate, yet notice will destroy all benefit he may otherwise derive from that, reducing his equity below that of the person of whose claim he is informed, and giving to such claimant a superior equity which the possession of the legal estate alone will not counter-balance. And this opinion against the learned author’s distinction is submitted with the greater confidence, as it is a distinction not only disregarded in practice, but uniformly opposed by all subsequent text writers

a purchaser of the matter determined, after the cause is ended (g) (h).

There is no case in which equity has determined the property of goods to be affected by reason of a *lis pendens*, where possession is the principal evidence of ownership, as of personal chattels (h) (i).

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Lis pendens of personally not notice.

If there be several mortgages of lands lying in a registered county, each of them being registered in their proper order,

Registration not constructive notice (k).

(g) 2 Atk. 392.

dens and decree is considered at large

(h) 2 Ves. 244. [The two last references are incorrectly quoted.—

in a former page and note. See ante, vol. i. 546, n. (R).—Ed.]

What notice is created by a *lis pen-*

on the subject. Thus, Mr. Sugden, after referring to the doctrine proposed in the text, observes, "This is an attempt to establish a new distinction, between a term assigned upon an express trust to attend the inheritance, and a term attendant by the construction of equity; an attempt which Lord Hardwicke appears to have over-ruled in the case of *Willoughby v. Willoughby*, and it would be very imprudent for a purchaser of an estate in any case to rely on a term of years, as a protection against any incumbrance of which he has express or implied notice." Ven. & Pur. 377, 5th edition.

Term no protection against incumbrance of which party has actual or implied notice.

(H) In *Giffard's case*, 1 Freem. 311, it was made a question, whether a former decree was of itself notice to a purchaser. The case in the text may be considered as deciding this question in the negative. But being present at the hearing of a suit will affect one with notice of the decree which follows. *Harvey v. Montague*, 1 Vern. 57, cited ante, vol. i. 551, the last case in the Editor's note there.

Being present at hearing, good notice.

(I) And here it may be in order to observe, that a public act of parliament is notice to all mankind; but a private act of parliament is not. *Hesse v. Stevenson*, 3 Bos. & Pul. 565. 578. *Pomfort v. Windsor*, 2 Ves. 480.

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Act of parliament.

(K) By the registry acts it is provided, that all deeds and wills concerning any honors, manors, lands, tenements, or hereditaments, in the county of Middlesex, or in the East, West, and North Ridings of the county of York, or in the town and county of Kingston-upon-Hull, whereby such hereditaments shall be any way affected in law or equity, shall be registered in offices established for that purpose in the county and ridings above-mentioned; and that every such deed or will shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless as to deeds a memorial of them be registered, before the registering of the memorial of the deed or conveyance, under which such subsequent purchaser or mortgagee shall claim, and unless as to wills a memorial of them be registered within six months after the death of the testator, dying in Great Britain, or within three

Deeds and wills to be registered in what time.

and afterwards the mortgagee *eigne*, having the legal estate;

Copyholds and leases excepted, but judgments included in registry acts.

years after his or her death, dying upon the sea or in parts beyond the seas. 2 & 3 Anne, c. 4. s. 1. 5 Anne, c. 18. 6 Anne, c. 35. 7 Anne, c. 20. 8 Geo. 2. c. 6. In these statutes there is an exception of copyhold estates, (see 2 Watk. Cop. 155, n. 4th edit.) leases at rack-rent, and leases for twenty-one years, where the actual possession accompanies the lease; as also of chambers in Serjeants' Inn, the inns of Court and Chancery; and it is declared, that no judgments, statute or recognizance, shall take effect but from the time of their registry.

Of the memorial.

The memorial is to be written on stamped vellum or parchment; to be under the hand and seal of some or one of the grantors or grantees, their heirs, executors, or administrators, guardians, or trustees, in case of a deed, and some or one of the devisees, their heirs, &c. in case of a will; to be attested by two witnesses, one of whom must be a witness to the deed or will, and must make oath before one of the registrars of the execution of the deed and memorial. The oath is, that the deponent saw the memorial signed and sealed, and the deed to which it refers duly executed. The memorial is to contain the date of the deed or will, and the names and additions of all the parties to such deed, and of the deviser or testatrix of such will, and of all the witnesses to such deed or will, and the places of their abode, and must also express the parcels, with the places where the premises lie. And the deed or will, or the probate, or an office copy thereof, is to be produced or left at the office of the registrar, who is to indorse a certificate thereon which is evidence. In *Eyre v. Dolphin*, 2 Ball. & Bea. 290, it was made a question, whether, in order to constitute such a registration as would, under the Irish registry act (6 Anne, c. 2.), give a deed priority, a certificate that the deed was produced to the officer at the time of registry should be indorsed then, or whether, if indorsed at a subsequent period, it would be sufficient? This, of course, must remain a question till actually decided; but the probabilities are, that an indorsement, at the time of the deed produced, would be considered as a mere formality, and curable, if omitted, by a proper indorsement at any subsequent period. If there be more deeds than one, the parcels need only be specified in one memorial, to which the others may refer; and as a general rule it may be observed, that where the memorial does not comply with the directions of the act, the person claiming under the deed defectively registered, cannot insist on the benefit of the statute against a subsequent purchaser without notice whose conveyance is duly registered, Sug. Ven. & Pur. 603, 5th edit.; and *note*, that a memorial of registry containing the substance of a covenant in a lease, though not expressly setting forth a proviso in it, has been held to be a good registration, the proviso being implied in the covenant. *M'Alpine v. Swift*, 1 Ball & Bea. 285.

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Death of witnesses before registration.

If the registry of a deed has been omitted till the subscribing witnesses are dead or not to be found, any of the parties living may re-execute the deed, and sign and seal the memorial in the presence of other witnesses, by which means the deed may be registered; and if the parties themselves are all dead, the heir or legal representative being executor or administrator of any one of

advances a farther sum of money to the mortgagor, the re-

them, may execute a memorial, in presence of one of the subscribing witnesses, referring to the deed and stating the death of such party, and then that witness may attest the memorial for registry.

The memorial of a will, to be binding on subsequent purchasers or mortgagees must, we have seen, be registered within six months after the death of the testator, dying in Great Britain, or within three years after his death, if he die on or in parts beyond the seas. The words of the act are, that "all deeds and wills may be registered as thereafter directed." Hence it has been inferred, that no time is limited within which a will *must* be registered, and consequently that it may be done *at any time* where there is no adverse title under a prior registered conveyance. Sugd. Ven. & Pu. 596, 5th edit. A slight attention to the clauses of the act will shew that this inference is at least questionable, if not entirely unfounded. After declaring that wills may be registered, the act provides, "that every such devise by will shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered at such times and in such manner as thereafter directed." It is then enacted, that "all memorials of wills that shall be registered within the space of *six months* after the death of every respective deviser or testatrix dying within the kingdom of Great Britain, shall be as valid and effectual as if the same had been registered immediately after the death of such respective deviser or testator." Hence it is apprehended, that a will cannot be registered with effect after six months have elapsed from the testator's death, and also that a will not registered within the six months, is, in the language of the statute, "fraudulent and void," and that the estate descends to the heir discharged of the devise and every trust and liability relating thereto. Mr. Wilson seems to think that the words "at such times" in the above clause, were introduced inadvertently, because they are not to be found in the other registry acts for York and Kingston-upon-Hull, and he submits that a compliance with the provisions of the Middlesex Act is not at all necessary, except to avoid intermediate dispositions by other persons, and that a registry of wills after the periods mentioned in the acts, (for such periods are not absolutely directed in any of them) though ineffectual for the purpose of giving them relation to the death of the testator, [against conveyances by the heir within the six months] will be effectual against conveyances operating adversely to the title of the devisees, which [conveyances] are not registered till after the registry of the will. Wilson's Reg. 21.

Mr. Wilson's principal reason for this construction is, that the act does not expressly state that the will shall be void. His words are, "for it is not stated in the provisoes, that wills which are not registered within the times there mentioned, shall be fraudulent and void, but that a registry within those times shall give the will a relation to the death of the testator; he therefore submits that the statement that all wills are to be adjudged fraudulent and void against subsequent purchasers, &c. unless registered within those periods, is not the language of the statutes, and that if there be any ambiguity in the statutes, that construction is not required to be put upon them in order to

gistry of the intermediate incumbrances will not be construe-

guard against the mischief which they were intended to prevent. Wills. Reg. 21.—It is true that the statute does not in *totidem verbis*, say that wills not registered within twelve months shall be void, but it says so by inference in as plain a manner as words could express it. The true reading, it is conceived, is, “that every will of lands in Middlesex shall be void unless registered at such time as hereinafter mentioned.” Now what is that time?—six months. The act declares that wills registered within that time shall be valid against conveyances by the heir—which implies, irresistibly, that wills not so registered shall not be valid, and that implication is actually provided for by the above clause. But a quibble may be raised here, that all this applies only to conveyances by the heir before the six months, and that if he has not prepared himself with a conveyance before the six months are elapsed, he cannot afterwards make such a conveyance against the devisee. Such, however, can never be tolerated as the sound interpretation of the act in question.—Suppose A. devises an estate to B. in fee, and six months elapse, and then B. procures the will to be registered, and conveys to C. which conveyance is registered, and afterwards the heir of A. enters and conveys to D., which conveyance is registered. Can D. support an ejectment? It is submitted that he cannot; but it must be remembered that no case has gone this length, and that both Mr. Wilson and Mr. Sugden are opposed to this construction. It cannot certainly be advised to omit the registration of wills. Formerly this omission was very common, but now it is understood to be the practice to register wills without reserve, as also wills appointing executors who take attendant terms of their testators, and limited administrations granted for the purpose of proving representations to attendant terms for years.

Wills.

In case the devisee in a will, by reason of any suppression or contest respecting the will or other inevitable difficulty, without his wilful default, shall be disabled to exhibit a memorial for registry within the time limited, then a memorial of such impediment or concealment must be entered in the registry office, within two years after the death of the deviser, dying in Great Britain, or within the space of four years after the death of the deviser, if he shall die abroad; and a memorial of the will within six months after a removal of the impediment is declared by the act to be a sufficient registry. But no concealed will is to affect a purchaser, unless it be registered within five years after the death of the testator; and it seems, that the registration of wills, probates, and office copies of wills, after the periods directed by the statutes, will be ineffectual to the parties—in the same manner that docketing a judgment after due time will be of no avail.

Of registering mortgages.

A memorial of a mortgage will be added in the Third Volume. It will be proper to notice in the memorial, that the deed was a mortgage for the purpose of rendering intelligible the certificate to be entered in the margin of its being paid off. But this is not required by the act, nor indeed is any other condition, trust, or purport of the deed, required to be disclosed on the registry. This has led some gentlemen to think that a solicitor, who prepares a memorial of a mortgage so as to disclose the nature of the transaction on the registry, divulges the secrets of his clients, and unnecessarily, if not wan-

tive notice, so as to take from him the benefit of protecting

truly, exposes the affairs of the mortgagor, without increasing the security of the mortgagee, and it is said, that since the introduction of the object of the mortgage deed on the registry, can give no greater efficacy to the deed than recording it in the precise and contracted terms which the law imposes: it follows that the publicity which is given to it by the mode of registry in practice, is neither incumbent nor justifiable; for that when a purchaser discovers what deeds are executed, he will of course require the production of them; and so no mischief can arise by a strict adherence to the letter of the act. See Rigge on Reg. 57. Sug. Ven. & Pur. 602, and Wils. on Reg. 43. It may, however, be asked, what end can be answered except that of giving additional trouble, by withholding from the registry the nature of the transaction, when ultimately, it is admitted, the purchaser must become acquainted with the object of the deed? And will not the imputation of disingenuous conduct arise, and engender a suspicion that something more objectionable than a mortgage is attempted to be concealed? But supposing the mortgage paid off, then it is requisite that a certificate of satisfaction should be entered as above stated; but it will appear absurd to add in the margin a note, that the mortgage money has been repaid, when the instrument registered purports to be an absolute conveyance. It is therefore conceived, that the prevailing practice of noticing the proviso for redemption in the memorial of a mortgage, is a perfectly correct mode of registration, and ought not to be discontinued or discountenanced; for the mortgage transaction must ultimately be disclosed, and a frank and candid avowal of the incumbrance is certainly preferable to a slow, and apparently reluctant production of the deed.

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As to entering satisfaction on mortgages, it is declared by the above acts, that if a certificate shall be produced under the hand of the mortgagee or mortgagees, in such mortgage, his, her, or their executors, administrators, or assigns, and attested by two witnesses, whereby it shall appear that all monies due upon such mortgage have been paid and satisfied, and the witnesses shall upon their oaths before the registrar prove such monies to have been paid accordingly, and that they saw such certificate signed by the said mortgagee or mortgagees, his or her executors, administrators, or assigns, the registrar shall make an entry in the margin of the book, wherein such mortgage shall be registered, that the same was satisfied and discharged according to such certificate, and shall file such certificate to remain upon record in the said register office. The registrar will then, on the deed so to be discharged being produced, indorse his certificate thereupon, certifying the discharge of such mortgage pursuant to the directions of the act of parliament.

Of entering satisfaction thereon.

The first registry acts having passed little more than twenty years after the statute of frauds, whereby it is enacted, "that no lease, estate, or interest of freehold, or term of years, or any uncertain interest not being copyhold, shall be surrendered, unless by deed or note in writing, signed by the parties surrendering the same:" there can be little doubt that the mortgage certificate when signed by the parties acknowledging payment and satisfaction in discharge of the mortgage, was intended to operate as a surrender,—which

Certificate does not pass legal estate.

himself by his legal title. Thus, where A. lent money on lands (i), the mortgage being duly registered, and afterwards

(i) *Bedford v. Backhouse*, 2 Eq. Ca. et vide S. P. ante, vol. i. 153, in *notis* Abr. 615, pl. 12. [S. C. 1 Wm. Kel. 5; —Ed.]

“does not require any technical words, but such only as express the intention,” 2 Rol. Abr. 497; and is defined to be “a yielding up of an estate for life or years to him that hath an intermediate estate in reversion or remainder, wherein the estate for life or years may drown.” 1 Inst. 337 b. But it is, notwithstanding the general opinion, that this certificate would not divest the mortgagee of the legal estate, and that a purchaser cannot be compelled to accept it, and it is never relied on now, as a note in writing to operate as a surrender must have the appropriate stamp.

Of registering judgments. These bind lands from time of registration only.

The memorial of a judgment is to contain, 1st, the court in which the judgment is obtained, and of what term; 2d, the names and additions of the plaintiffs and defendants; 3d, the sum or sums recovered by such judgment; and, 4th, the day and year on which such judgment was signed; and it is declared that no judgment, statute, or recognizance (other than such as shall be entered into in the name, and upon the proper account of his majesty, his heirs and successors,) shall bind any lands, tenements, or hereditaments, but only from the time that a memorial thereof shall have been duly entered at the register office. This clause is general as to property in Middlesex; but in the East and West Ridings of York, and the town and county of Kingston-upon-Hull, if the judgment, statute, or recognizance, be registered within thirty days from the time of the acknowledgment or signing thereof, it will bind all the lands of the defendant at the time of such acknowledgment or signing. In the North Riding of York the time is limited to twenty days. But when the judgment is paid off, it is not required that satisfaction should be entered in the margin as in the case of a mortgage. Entry of satisfaction on the records of the court wherein the judgment is docketed will be sufficient.

Deeds of appointment.

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Deeds of appointment in execution of powers must be registered if the lands, which are the subject of them, lie in a register county. On this ground a defendant, (who claimed under a deed of appointment, and who admitted that the prior deed of 1742, which created the power, was not registered, and that the deed of appointment was not registered until 1748, which was two years after the registry of the plaintiff's mortgage), was postponed to the plaintiff's mortgage, which was so registered before the deed under which he claimed. *Scrutton v. Quincey*, 2 Ves. 413.

Equitable mortgages and charges should be registered.

It is also necessary that liens and charges on the equitable estate, and such as are available in a court of equity only should be registered. Thus, where A. was indebted to one Stanton in a bond for 500l., and being possessed of the premises in question for the residue of a term of ninety-nine years covenanted, that in default of payment of the said sum of 500l., the said premises should stand as a security for the same; and that he would, on request, execute a mortgage of the said premises, to secure the said sum of 500l. This deed was never registered. Lord Northington said, “the priority of the defendant is founded on a latent deed [namely, the said covenant], which ought to have

lent money on mortgage on the same security, and his mortgage was also registered, and then A. advanced a farther

been registered; and from the laches and conduct of those under whom he claims, he has forfeited all priority in this court, and the deed being within the registering act, is void against the plaintiff." *Hennard v. Moore*, 1 Eden Rep. 327; et vide *Price, Ex parte*, 1 Buck, 221.

Leases exceeding twenty-one years, and such as are not at rack rent, and assignments of them, are within the meaning of the registry acts, and must be registered. On this head it has been determined, that the registry of an assignment of a lease, wherein the original lease is recited, will not be a sufficient registry of the lease itself; for the act says, the deed under which the parties claim, with the witnesses names, shall be registered; and of this a subsequent purchaser can have no notice by the bare registry of the assignment; and it is also required that the original be produced to the officer. *Hentycob v. Waldron*, 2 Stra. 1064; et vide *Williams v. Sorrell*, 4 Ves. 389. Leases which are originally let at rack-rent are considered as continuing so; and they are thereby excepted from the operation of the act, though they may afterwards become valuable leases. Leases not exceeding twenty-one years, where the possession and occupation go along with such leases, are also excepted. An assignment therefore of such a lease out and out to a purchaser who takes possession, is within the words of the exception; for the possession accompanies the lease; but in the case of an assignment by way of mortgage, the possession does not usually accompany the lease, and therefore registration of the mortgage is generally recommended. Such a course was adopted in *Bailey v. Fennor*, and the court inclined to think rightly, 9 Price, 268.

Of registering leases and assignments.

In conclusion we may observe, that clerical mistakes do not vitiate the enrolment under the registry act. In a late case it was contended, that a deed was not duly registered, first, because the name of the trustee was spelt "Soden" in the deed, and "Seden" in the enrolment; secondly, because after stating the assignment to be to Seden, his executors and administrators, the *habendum* was to Cowie, his executors and administrators. Sir William Grant however did not conceive that these mistakes annulled the enrolment. No object of the registry act could be affected by either of them: and his Honor observed, that notwithstanding the rigorous exactness which has been required in enrolments under the annuity act (stat. 17 Geo. 3. c. 26), it was held in *Ince v. Everard*, 6 T. R. 545, that clerical mistakes do not vitiate the memorial. In that case the term assigned was of sixty-one years; it was stated to be sixty-two; the consideration was stated to be 280*l.*; but when they came to aver payment of the consideration, the statement was, that the said sum of 250*l.* was really and *bonâ fide* paid. This last was a more important blunder than that of stating the *habendum* to be to Cowie, as the law said, that such an *habendum* being repugnant was a mere nullity; and then the assignment stated, stood as an assignment to Soden, which was according to the truth of the fact, and would be sufficient without any *habendum*, whereas in the case referred to, it was left in a degree ambiguous, whether any such sum as 280*l.* had been

Clerical error does not vitiate enrolment.

sum on the same lands without notice of the second mortgage, it was held, by Lord Chancellor King, that the registering of the second mortgage was not *constructive* notice to the first mortgagee before his advancement of the latter sums; for though the statute avoided deeds not registered, as against purchasers, yet it gave no greater efficacy to deeds that were registered, than they had before (L).

It being a mere formality to give efficacy to deed.

So, in a late case, where W. advanced 800*l.* on a mortgage in Yorkshire (k), and registered it; afterwards K. lent a sum of money, and took a judgment for it, which was also registered; then W. advanced a farther sum, but without any express notice of the judgment; it was argued on a bill brought by W. to foreclose, that K. ought to redeem, on paying the first mortgage; for that, where such registers prevailed, every incumbrancer should be satisfied according to the priority of his register; and that the registering K.'s judgment was constructive notice to W., sufficient to deprive him

(k) *Wrightson v. Hudson*, 2 Eq. Ca. Abr. 609, pl. 7.

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actually paid. As to the mistake of a letter in the name of the trustee, Sir William Grant did not see in what way it could operate to disappoint any object of the act, when the substance of the transaction was admitted to be correctly set forth. If search were to be made by an index of names of persons, a mistake of this kind might be of some importance but the calendar to be kept at the register's office was of the parishes, places, and townships, in which the lands laid; and his Honor gave judgment accordingly. *Wyatt v. Barwell*, 19 Ves. 435. For more on registration, see Mr. Rigge's truly useful "Practical Observations on the Statutes for Registering Deeds," and Sugd. Ven. & Pur. Chap. XVI. s. 5. and a late publication on this subject by Mr. Wilson, 1819. et infra, 628. 631.

Registration not notice to mortgagor of assignment of mortgage, nor to mortgagee of sale of equity of redemption.

(L) And the rule in equity is, that if a first mortgagee lends a further sum of money without notice of the second mortgage, his whole money shall be paid in the first place. This principle has been held to extend to a mortgagor paying off mortgage-money to a mortgagee, without notice of his having transferred the mortgage; which is a valid payment, although the transfer of the mortgage be duly registered. *Williams v. Sorrell*, 4 Ves. 389. And Mr. Sugden, with great reason, conceives, that the rule would apply to a mortgagee, lending a further sum of money to the mortgagor without notice of the sale of the equity of redemption. Sug. V. & P. 607, 5th edit. A purchaser, therefore, of an equity of redemption of an estate should, immediately after the sale, give notice of it to the mortgagee, although the estate be in a register county, and his conveyance be duly registered.

of the common benefit of a court of equity, whereby a first mortgagee, without notice, was to hold till all the subsequent incumbrances due to him were discharged.

But it was resolved, that these statutes avoided only prior charges not registered, but did not give *subsequent* conveyances registered, any farther force against *prior* conveyances registered, than they had before; and that to have affected W., K. ought to have given him notice when he advanced his money; for, though W. might have searched the register, yet he was not bound so to do.

Purchaser may search register, but not bound to do so. To prevent further advances judgment creditor should fix prior mortgagees with actual notice.

This construction of the registering act appears to me consonant to the general principles of law and equity (M); for, if the second mortgagee had used due diligence, he might have

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Second mortgagee should take a similar precaution.

(M) But not with the spirit and meaning of the act 7 Ann. c. 20, the preamble of which shews plainly that its intention was to secure subsequent purchasers and mortgagees against prior secret conveyances and fraudulent incumbrances. This, it would have been in vain to attempt, if, at the same time, it had been declared, that, notwithstanding the registry, no person should be presumed to have knowledge of prior conveyances, unless it could be proved that they had searched the registry; for the same conveyances might then have been equally secret, notwithstanding the act, if a purchaser, on completing his purchase, was not to be deemed bound by all the prior mortgages and conveyances disclosed by the registry. But it seems clearly to have been the intention of the framers of the registry acts, that they should operate as notice to all persons, and be a public repository for deeds to which any person might resort. The only ground on which a contrary doctrine can be founded, is adduced by the learned Author in the sequel of this paragraph. But Lord Hardwicke, in one case, *Hins v. Dodd*, 2 Atk. 275, is represented to have said, that the register act was intended to give notice to the parties and notice to every body; and that the meaning of the statute was to prevent parol proofs of notice or not notice. That case, however, did not at all turn upon the point under discussion, and therefore there was no express decision that the statute was in itself notice, Rigge on Reg. p. 39; and it is observable, that that construction has never since been recognized, nor was it ever before adopted. Lord Camden, indeed, said, if it were a new point, it might admit of difficulty; but the determination in *Bedford v. Backhouse* seemed to have settled it, and it would be mischievous to disturb it. The act provided for one single case only, that was, to make unregistered deeds void against registered deeds; but there was no provision by the act, in a case where all the deeds were registered. And yet it became a serious question whether a court of equity should not say, that in all cases of registry, which was a public depositary for deeds, and to which any person might resort, a subse-

Registry acts intended to be notice to all the world.

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informed himself by the register, who was the prior mortgagee, and by serving an actual notice upon him, effectually secured himself against any farther loan; and therefore this case falls within the common rule, that where, of two persons equally innocent, or equally blameable, one must suffer, the loss shall be left with him on whom it has fallen. The second mortgagee having no more claim to equity than the first, the former will be left in possession of the benefit the law gives him, of protecting himself by the legal estate.

*Notice of an
unregistered
mortgage, bind-
ing (x).*

But a subsequent mortgagee (l), having notice of a prior mortgage not registered, will not gain a priority by registering,

(l) [*Doe v. Routledge*, Cowp. Rep. *Blades v. Blades*, 1 Eq. Ca. Abr. 358, 712, et vide S. L. per Lord King, in pl. 1 & 2.—Ed.]

quent purchaser ought not to search, or be bound by notice of the registry, as he would of a decree in equity, or a judgment at law. [As to this however, see ante, 550 and 596.] It was a point in which a great deal of property was concerned, and was a matter of consequence. Much property had been settled, and conveyances had proceeded on the ground of that determination. In the case of *Vandebendy*, in the House of Lords, the doctrine about dower prevailed, because it had been practised in a course of conveyancing. A thousand neglects to search had been occasioned by that determination, and therefore Lord Camden could not take upon himself to alter it. If it were a new case he should have had his doubts; but the point was closed by that determination, which had been acquiesced in ever since. *Morecock v. Dickens*, Amb. 678. It may therefore be considered as settled, that the statutes do not operate to give every person notice of the will, conveyance, or incumbrance recorded; and that a person having the legal estate is not bound to search the registry for incumbrances created prior to the time of his becoming seised thereof. But to return to the text; where the culpability is thrown on the second mortgagee for not having searched the register and fixed the first mortgagee with actual notice of his incumbrance, *dehors* the register; but the second mortgagee, it should be observed, is not blameable for omitting to search (a fault, if any, of which the first mortgagee stands equally chargeable), but for not giving notice to the first mortgagee, whose incumbrance he might, by means of the register, have easily discovered.

The late cases of *Doe v. Alsop*, 5 Barn. & Ald. 142, and *Hodgson v. Dean*, are noticed infra, 631 a.

*Against regis-
tered convey-
ance actual no-
tice only will
avail; his pen-
dents not suffi-
cient.*

(N) But to affect a registered deed by notice of a prior unregistered deed, actual notice must have been given and clearly proved. A registered deed stands upon a different footing from an ordinary conveyance. It has been much doubted whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance;

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v.
Le Neve.

because such conduct is considered, in equity, as fraudulent, and the party hath that notice which the act of parliament intended he should have. As, where N., in 1718 (*m*), married his first wife, and, on the marriage, a leasehold estate, in the possession of his father, was covenanted, in consideration of the marriage, and her personal estate, to be settled on trustees, in trust, for N. for life, then for his intended wife for life, remainder to the issue of the body of N. by his wife, in such manner as he, by deed or will, should appoint. The marriage was had, and a settlement made, in pursuance of the articles; the wife had issue, and died. In 1743 N. married a second wife, but, previous thereto, entered into articles with her trustees for settling the very same estate on himself for life, then on her for a jointure, remainder to the issue of that marriage; and a settlement was made pursuant thereto. The estate was subject to the statute 7 Queen Anne, cap. 20, which requires registry. The first marriage articles and settlement were never registered; the second were. N. also mortgaged this estate, as absolute owner thereof.

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The bill was brought by the children of the first marriage, to have the benefit of the settlement made on them, and, in order thereto, to have the subsequent articles and settlement postponed, though registered.

(*m*) *Le Neve v. Le Neve*, 1 Ves. 64. [S. C. 2 Eq. Ca. Abr. 63.—Ed.] Et 3 Atk. 646. [S. C. Amb. 436.—Ed.] *Sheldon v. Cox*, Amb. 624. [S. C. Et vide *Chevall v. Nichols*, Stra. 664. ante, 584, and 2 Eden, 224.—Ed.]

but they have said, "we cannot permit fraud to prevail, and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected." But even under this limitation the security, derived from the register, is considerably lessened; as no one can with certainty tell what circumstances may, truly or falsely, be given in evidence; or what judgment a court will form as to the effect of the evidence in any particular case. It is, however, only by actual notice [of the unregistered deed] clearly proved, that a registered conveyance can be postponed. Even a *lis pendens* is not deemed notice for that purpose. *Wyatt v. Barwell*, 19 Ves. 439. Hence, therefore, where a deed has been registered, constructive notice by other means than by the register will not be sufficient; there must be actual notice, and then the subsequent registration, so far as it is done with an intent to obtain priority of the previous unregistered instrument, will amount to fraud.

Le Neve
v.
Le Neve.

The ground of this application was, that the agent, who made the last settlement, had notice of the first. And, notice to the agent having been fully made out, the principal question was, whether it would affect the defendant's purchase, and oblige the court to postpone the second articles and settlement to the first, notwithstanding the registering act.

Construction of
7 Anne, c. 20.

And the court determined it would; for the intent of the act was to secure the subsequent purchasers and mortgagees against prior secret conveyances, by letting a subsequent purchaser, having registered, prevail against a prior secret conveyance, of which he had no notice; but if he had notice of a prior conveyance, which was vested property, that was no secret conveyance. The statute did not say, that the subsequent purchaser should not be affected by any equity whatsoever; therefore, though the manifest operation of it was to vest the legal estate according to the prior registering, yet it was left open to all equity; for there was no danger to the subsequent purchaser, who might refuse, if he had notice of the prior good conveyance (o).

And this doctrine was confirmed in the House of Lords, upon an appeal, in the case of *Lord Forbes v. Denison*, which arose in Ireland (n) (p).

(n) Cited in last case, 1 Ves. 67. 189. The same case is mentioned in 2 Bro. P. C. 425. [4 Toml. edit. Lord Harcourt's MS. Tables.—Ed.]

Extract from
report.

(O) The words of the report are remarkable. They are the following:—
“The enacting clause says, that every such deed shall be void against any subsequent purchaser or mortgagee, unless the memorial thereof be registered, &c. that is, it gives them the legal estate, but it does not say, that such subsequent purchaser is not left open to any equity which a prior purchaser or incumbrancer may have; for he can be in no danger where he knows of another incumbrance, because he might then have stopped his hand from proceeding.” 3 Atk. 650.

Registry acts
do not affect
rules in equity.

Every case on the registry acts, both in England and Ireland, which has been brought before a court of equity, has been determined on this ground, that these acts do not affect the great fundamental principles of equity; but that every purchaser claiming under a registered deed, is left open to any equity which a prior purchaser or incumbrancer may have. *Chandos v. Brownlow*, 2 Ridgw. P. C. 428.

Unregistered
lease, with no-

(P) This case arose, as the author states, on the Irish register act, which is general. It was to the following effect:—G. being tenant for life, with

But though apparent fraud, and *clear* and *undoubted* notice, are held to be a proper ground of relief in cases circumstanced like the preceding ones (o), *suspicion* of notice, though a *strong*

Suspicion of notice not enough (u).

(o) Vide *Jolland v. Stainbridge*, 3 Ves. 478, the evidence of notice ought to amount to actual fraud (n).

remainder to his first and other sons in tail, with power to himself to let the premises on leases for lives, granted a lease for three lives, which was not registered. He afterwards agreed with F. his eldest son, by the agency of S., to sell him his life estate, upon F.'s paying his father's debts, and securing other payments; and the estate was accordingly conveyed to trustees for F., and the conveyance was registered. The trustees having brought an ejectment against the lessee, he applied to the Court of Chancery; and, upon proving that S. who was F.'s agent, had notice of the lease during the treaty for the purchase, Lord Middleton, C. awarded a perpetual injunction against F. and his trustees. From this decree there was an appeal to the Irish House of Lords, where it was reserved as to part, the injunction being restrained to the life of G., because the lease was not got under the power; but, as to the principal point, the decree was affirmed. This appears to have been an extremely well considered case, both by the Chancellor and the House of Lords, The House of Lords determined that the words of the act, which made an unregistered deed fraudulent and void against a subsequent registered deed, had not that effect if the party had notice of the prior deeds; for if a man had notice, he could not say he was defrauded; it was fraudulent in him to take a conveyance to defeat the charge of another. See Sch. & Lef. 100. This case was followed by that of *Chevall v. Nicholls*, before Lord C. B. Gilbert (2 Eq. Ca. Abr. 63. pl. 7. 1 Str. 664), where it was held, in conformity to the case of *Forbes v. Denison*, that a person having notice of a prior incumbrance could not impeach it for want of registry. Then came *Beatniffe v. Smith*, 1 Eq. Ca. Abr. 357, pl. 11; but that case does not fully decide the question, as it turned considerably on the fraud, which was inferred from the plaintiff's concealing the articles. This case arose on the Middlesex registry act. Then followed the case of *Blades v. Blades*, in 1 Eq. Ca. Abr. 358, pl. 12, on the Yorkshire registry act; and there Lord King decreed against the words of the act, on the ground that the party had notice of the first purchase, and then the procuring of his own deed to be registered first was a fraudulent act. This case also resembles that of *Forbes v. Denison*, but is a much stronger case.

tice, binding on subsequent purchaser.

(Q) So mere suspicion of a fact arising from opinions in the abstract, &c. will not support an objection to the title by a purchaser, *M'Queen v. Farquhar*, 11 Ves. 467; nor will mere suspicion of fraud amount to constructive notice of the fraud. Thus, the mere circumstance of the father first contracting to sell the estate, and then appointing to a child who joins in the sale, will not affect the purchaser where the contract appears to have been fair, and the purchase-money to have been paid to all the parties, and there is nothing to shew that the son was not to receive a due proportion of the money. *M'Queen v. Farquhar*, ubi supra.

Suspicion of fraud not notice thereof.

(R) That is, when a person takes with actual notice of another's right, he is considered as coming in fraudulently, and as the fraud arises from the

Proof of notice by parol.

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suspicion, was held by Lord Hardwicke *not* to be sufficient to justify the Court of Chancery in breaking in upon this *act of parliament*. And therefore, where a mortgagee (*p*), of lands in Middlesex, swore in his answer, that, to *his belief*, he did not know of a judgment which had not been registered until after his mortgage executed; this was contradicted by *one* witness *only*, who swore, that, on a conversation at which she was present, the mortgagee admitted that it was true "he knew of the judgment, but that he knew, at the same time, that was not registered, and what were acts of parliament for, unless they were effectually observed?" Lord Hardwicke said, that, undoubtedly, this was *material* evidence, but then it was only *one* witness against the answer of the defendant, and the evidence amounted merely to a defendant's *confession* in contradiction to his *answer*, and was contrary to a positive act of parliament made to prevent any temptation to perjury from contrariety of evidence. His Lordship, therefore, dismissed the plaintiff's bill as to this part of the case.

Three incumbrances registered, puisne mortgagee purchasing first gains priority. Semb.

I have not met with any case wherein it hath been determined that a *puisne* mortgagee, where there are several incumbrances registered, shall protect himself, by purchasing in an *eigne* incumbrance, which brings with it the legal estate; but that case seems to fall within the same reason as the last. It is evident from the preamble of the 2d & 3d Anne, c. 4. that the object of the legislature in that statute (which laid the foundation of the subsequent registering acts) was to enable mortgagors to give such satisfactory security to monied men, as would induce them to advance their money, on landed security, to persons in trade, which it was thought would tend to the national benefit. The mode adopted by the legislature to affect this purpose, was, to secure them against prior claims, by establishing a register, where all incumbrances that

(*p*) *Hine v. Dodd*, 2 Atk. 275. Lord Manners in 2 Ball & Bea. 301. [S. C. Barn. 258, and recognized by —Ed.]

notice, the evidence of notice should be clear and explicit, which it seems may be proved by parol; but Lord Alvanley observes, "I regret that the statute has been broken in upon by parol evidence, and am glad to find Lord Hardwicke, in *Hine v. Dodd*, says, nothing short of actual fraud will do." *Jolland v. Stainbridge*, 3 Ves. 478.

affected the estate might be seen; and by giving securities registered, though posterior in date, a priority: but it was not necessary to alter the law, as to the priority amongst incumbrances registered; for, if a mortgagee neglects searching the registry, he ceases to be an object of legal favor; and, if he searches, and, notwithstanding there be an incumbrancer prior to his, lends his money, he takes the equitable estate *only*, with notice, and, having voluntarily accepted it, of course becomes liable to the incidents and contingencies to which that kind of security is, in its nature, exposed. The true construction of the act therefore seems to be, that it has left mortgagees, whose incumbrances are registered, in the same situation, as to each other, as they were previous to these statutes. In which case, the *puisne* mortgagee, having purchased in the first incumbrance, would have been entitled to a priority; he having the best title in law, and as much equity as the *mesne* mortgagee (s).

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EXPOSITION OF REGISTRY ACTS.

(S) Of this there can be little doubt. Lord Camden has said, that the acts do not provide for cases where all the deeds are registered. They apply only to make unregistered deeds void as against registered deeds and incumbrances, *Merecock v. Dickens*, cited ante, 623, in *notis*; and per Lord Northington, the statute of 7 Ann. c. 20, was only intended to protect purchasers against secret conveyances: it did not affect the question of notice: it left that as if the statute had never been made. *Sheldon v. Cox*, 2 Eden, 228. In short, the hypothecated case in the text has received an express decision by the assent of Lord Loughborough in *Cator v. Cooley*, 1 Cox, 182, where the plaintiff, being a third mortgagee without notice of the second mortgage, afterwards bought in the first mortgage, and brought his bill to foreclose the second mortgage, unless he would redeem *both* the plaintiff's mortgages; and the single question was, whether the register of the second mortgage (the lands being in Middlesex) was of itself such a notice as would affect the third mortgagee; but the counsel for the defendant admitted the point to be so well decided, that such register would not be sufficient without actual notice, that the contrary could not then be maintained; to which the Lord Chancellor assented, and decreed accordingly.

But it seems that if a devisee omit to register the will, and the heir at law takes possession of the estate for want of registry, and procures a further charge to himself, which is tacked to a subsisting mortgage of the property, the devisee, if he can afterwards procure the bill to be registered within the five years, will not be allowed to redeem the mortgage without paying also what was advanced to the heir; at least this was Mr. Ward's opinion (see 2 Cas. & Opin. 45), and many arguments present themselves to recommend it; but

REGISTRY ACTS.

No difference between actual and constructive notice.

Third mortgagee may purchase first, notwithstanding second be registered.

Devisee of equity of redemption must pay advances to heir, if will not registered in time. Sed quare.

*Mortgagee not
obliged to dis-*

It is an infallible rule, that a mortgagee may, in a cou:

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ACTS.**

*Registered
equitable in-
cumbrance may
be prejudiced by
subsequent in-
cumbrancer
purchasing
prior legal
estate.*

the observations of Mr. Sugden, cited in a former note, have a contrary tendency. See note (K), ante, p. 619.

It remains to be considered, whether a person purchasing without notice, and obtaining the legal estate, shall be prejudiced by a prior equitable incumbrance which was duly registered previous to his purchase. Lord Camden decided that he should not, in *Morecock v. Dickens*, Amb. 678, for that the registry of the equitable incumbrance was not notice. Lord Camden's decision in this case has been questioned, chiefly on the ground that *Bedford v. Backhouse*, ante, 620, (on which his Lordship's determination was entirely founded), was not an authority in point, the case before him raising in every respect a new question. It is, however, submitted, that the solution of the question depends wholly on the construction of the registry acts, in regard to the effect of registration of the equitable incumbrance. Is the registration of an equitable charge or conveyance to raise presumptive notice to all the world in the teeth of repeated and unanimous decisions, that the registration of conveyances of the legal estate, or of incumbrances creating legal liens, shall not operate as notice? We have seen that the registry acts have left the doctrine of notice untouched, and without notice, it is clear a subsequent purchaser of the legal estate may over-reach a prior equitable incumbrancer. But then, it is said, "Morecock had no means whatever of giving notice of his equitable incumbrance to Dickens, who afterwards acquired the legal interest. Dickens, on the other hand, might have searched the registry, and thereby have been apprised of the prior equitable charge." This is certainly true, but the same argument would apply in deterioration of acknowledged law, in respect to the docketing of judgments, and the enrolment of bargains and sales, which could not be tolerated. A judgment creditor has no means of giving the subsequent equitable incumbrancer notice of the judgment, *aliquid* the docket; yet the equitable incumbrancer, by searching the docket, may discover the judgment. The equitable incumbrancer may, however, purchase in a legal estate created prior to the judgment, and so over-reach the lien of the creditor. The best answer to the equitable incumbrancer is, that if he is so badly advised as to take an equitable security, he must run the hazard of other persons purchasing the legal title and thereby acquiring a preference to him. The observations in derogation of Lord Camden's decision are addressed to the case of a purchaser not having the legal estate at the time of his contract (*Sug. Ven. & Pur.* 611, 5th edit.), but who, after his own and the previous equitable incumbrance has been registered, obtains a conveyance of the legal estate, which it is presumed is also to be considered as duly registered. Removing notice out of the case, no objection is taken to the priority claimed by the subsequent purchaser, but it is said he entered into his equitable contract with full notice of the preceding equitable incumbrance, and should therefore be postponed to its payment. This, it is presumed, is the whole amount of objection; though not so expressed in as many words. But how has the second purchaser notice of the prior equitable charge? In no other way than by its registration, which we have seen is not constructive notice. It is submitted, therefore, that

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of equity, protect himself from discovery of his title-deeds cover title-deeds if he

few substantial reasons occur for invalidating the decision in *Morecock v. Dickens*, ubi supra.

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But the point does not rest upon opinion. Lord Redesdale has expressly acknowledged and confirmed the doctrine laid down by Lord Camden, in a subsequent case (*Bushell v. Bushell*, 1 Sch. & Lef. 90); and although in that case it may be said that Lord Redesdale was not called upon to decide the question, and that therefore his opinion was extra-judicial (see Wils. on Reg. 70), yet it must be remembered that the very question before his Lordship was, whether the registry of articles made prior to a settlement, under which the defendants claimed, did not make them come in as purchasers under the settlement with full notice of those articles; on the ground that the registry of a deed was notice to all the world of the existence of such deed and of its contents, so far as such contents were developed in the memorial? Lord Redesdale however was clearly of a contrary opinion, viz. *that registry was not notice*, and consequently that notwithstanding the registry, the persons, who took the legal estate under the settlement had undoubted priority to those who supported equitable claims under the articles. But his Lordship made this distinction between the English and Irish acts:—By the 4th section of the Irish act (6 Anne, c. 2) it was declared, that every deed or conveyance, a memorial whereof should be duly registered, according to the rules prescribed by the act, should be deemed and taken as good and effectual, both in law and equity, according to the priority of time of registering such memorial. Thus, it was expressly enacted, that, whatever might be the nature of the instrument, priority in the time of registering, would give it priority of operation both at law and in equity. But this clause was not in the English acts; and his Lordship said he had no sort of doubt of the true construction of the act in question (namely, the Irish act). The instrument registered must prevail against a subsequently registered instrument, by force of the clause in the 4th section, viz. that being an instrument which affected lands, it should be good, not only at law, but in equity, according to the priority of registry. This was not at all grounded on the next section of the act, which avoided unregistered conveyances; *that*, was a provision of a totally different description. The meaning of the former clause was to give full effect by force of the registry, even to articles, if registered, against a legal conveyance: so that the act had given to contracts registered a force and effect in Ireland, with respect to lands themselves, which they had not in England, there being no such clause in the English registry act. *This*, his Lordship took to be the true meaning of the act, as far as he could collect; and would answer all the purposes of every decision on the subject. On that interpretation of the Irish act, Lord Redesdale decided that the articles had acquired a priority by being registered; and therefore that the persons claiming under them were entitled to preference.

That doctrine confirmed.

English and Irish registry acts distinguished.

Registered deed of equitable estate, preferred in Ireland to subsequent registered deed of legal estate.

Contra in England.

And this doctrine has been acknowledged and acted on by Lord Manners, in *Eyre v. Dolphin*, 2 Ball & Bea. 299, where an equitable claimant urged, that the same right in equity which he had against the mortgagor and his representatives, was available against the mortgagee, who took a mortgage

Priority of title regulated by time of registry under Irish acts.

denies notice
(q q).

if he denies notice (q). For, if a plaintiff brings his bill to re-

(q) *Senhouse v. Earle*, 2 Ves. 450. (q q) [Except the purchase deed. *Perrat v. Ballard*, 3 Ch. Ca. 73. Ibid. Redesd. Tr. Pl. 219.—Ed.]
135, 136. 1 Vern. 27.

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of the property in 1780, on the ground, that a prior settlement in 1745, out of which the claimant's equitable title arose, was duly registered. Lord Manners said, if the deed of settlement were duly registered, the question was at an end; for the plea of a purchaser for valuable consideration without notice, could not avail against a prior duly registered deed; and whether the plaintiff's title were a legal or an equitable title it would have priority from its registration, whether the mortgagee had notice or not.

Mischief of con-
sidering regis-
tration, notice
in every court.

In the course of his judgment in *Bushell v. Bushell* (1 Sch. & Lef. 103) which was delivered after three months consideration, Lord Redesdale entered minutely into all the cases that had been decided on the English registry acts, and observed that the effect of all the decisions was, that registration could not be considered as notice, with all the consequences that would attach upon it as notice. If it were so considered, it would lead to very mischievous consequences. It was true that registry was considered as notice to a certain extent; no person thought of purchasing an estate without searching the registry; and, if he searched, he had notice; but his Lordship thought it could not be considered as notice to all intents, on account of the mischiefs that would arise from such a decision. For if it were to be taken as constructive notice it must be taken as notice of every thing that is contained in the memorial: if the memorial contained a recital of another instrument, it would be notice of that instrument—if of a fact, it would be notice of that fact.—These observations of Lord Redesdale were certainly gratuitous as to the English acts; but, considering the extent of investigation which his Lordship pursued, and the very able manner in which he pronounced his judgment, they are not the less sound or the less entitled to respect on that account.

Same.

In another case Lord Redesdale observed, that if registry be considered notice, it must be notice, whether the deed be duly registered or not: it may be unduly registered; and, if it be so, the act did not give it a preference; and thus this construction would avoid all the provisions in the act for complying with its requisites. *Latouche v. Dunsany*, 1 Sch. & Lef. 157. And in a later case the same noble Lord observed, that it seemed to him that nothing could be more mischievous than to hold that the putting any thing on the registry should be notice within the meaning of the word "notice," as applied to courts of equity in such cases; and that, on conversation with Lord Kilwarden, Lord Redesdale found (notwithstanding what had been urged to the contrary) that he (Lord Kilwarden) was impressed with the same opinion, though the common language of the court led to an idea that it was notice. The words of the [Irish] act gave priority to instruments, whether they conveyed a legal or only an equitable title according to the priority of their registry; but still, according to the rights, titles, and interests of the persons conveying; and that there was this important difference between

deem ever so strongly, he is not entitled to see the mortgagee's

actual notice and the operation of the registry act:—Actual notice might bind the conscience of the parties; the operation of the act may bind their title, but not their conscience. *Underwood v. Courtown*, 2 Sch. & Lef. 64. And in his place in the House of Lords, Lord Redesdale maintained the same opinion, observing, that the effect of registration was different in Ireland from what it was in England, as in Ireland the effect of registration was to give a preference, both at law and in equity, against all subsequent deeds whatever. *Daly v. Kelly*, 4 Dow. Par. Rep. 436. Accordingly, Lord Manners, in *Pentland v. Stokes*, 2 Ball & Bea. 75, held clearly, that the registry of a deed in Ireland gave priority, but did not affect a party with notice.

In a late appeal from an Irish decision this doctrine is thus laid down: If two deeds be executed bearing different dates, that which is first registered even with notice of the other deed, has priority both in law and equity, although it be posterior both in date and execution. On points in which the two deeds are inconsistent, the deed last registered is personally binding on the parties who execute; and the lands and property comprised in the deed first registered are also bound after satisfying the trusts of the first by the contracts and trusts of the deed last registered. *McNeil v. Cahill*, 2 Bligh, 228.

Tacking is not allowed under the Irish registry act; and this arises from the peculiar wording of that act, and the construction it has received. The meaning and intention of the act was to secure persons taking charges upon estates, to provide that they should have *that* to resort to, which would enable them to take with more security. Now tacking does tend most strongly to prevent purchasers (in which description mortgagees are included) from being so secured, because by its operation all intermediate incumbrances are to be prejudiced; they cannot be secured unless the effect of the act be to require all instruments affecting the estate to be brought by proper memorials upon the registry. The provisions of the act seem intended to enable a person dealing with an estate to say, "All instruments that can have effect against me are brought on the registry, and none which are not there can be brought against me." This necessarily excludes tacking; for that is giving effect to an instrument which a person is not enabled by means of the registry to discover: and the manner in which the act is framed, shews that such was the idea of the legislature. *Latouche v. Dunsany*, 1 Sch. & Lef. 159. In the same case it was said, that the effect of the 5th section of the same act was to give judgment creditors not only the priority which they would before have had against the registered deed, but a priority against the unregistered deed, which they had not before, and *that* for the sake of the registered deed; for the several incumbrances could not otherwise be arranged for the benefit of the registered deed.

At law, it has lately been held, that a second registered deed is to be preferred to a prior unregistered one with notice. *Doe v. Alsop*, 5 B. & A. 142. et ante, vol. i. 279 a. where the case is stated at large.

In a very recent case in Chancery, it was held by the Vice Chancellor, that, Mortgagee not a purchaser of land in a register county is not bound to search the register. bound to search

REGISTRY ACTS.

Difference between actual notice, and operation of registry act.

Tacking not allowed under Irish registry act.

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Priority of judgments under same act.

title-deeds, because a third person may find out a flaw in

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registry, but if he does search, he will be presumed to have notice of every thing on the registry within the period of his search.

The case was briefly this :—In 1738 Hodgson made a mortgage in fee to A. B. which was paid off, but no reconveyance executed. In 1755 Hodgson married, and settled the estate to the use of himself for life, with remainder to his wife for life, with remainder to their first and other sons in tail, with remainders over. In 1759 Hodgson procured a reconveyance of the legal estate from the mortgagee to himself in fee, and died in 1794, leaving a son, who entered into and continued in possession of the estate till his death in 1821. The mortgage, settlement, and reconveyance were all duly registered. In 1815 the son (N. B. Hodgson) mortgaged the estate to Dean for a term of 1000 years, for securing 2000*l.* and interest, representing himself to be seised of the estate in fee, when in truth he was not, being only tenant in tail under the settlement, though he might have acquired the fee by recovery, but no recovery was suffered on the occasion of the mortgage. Dean's solicitor, preparatory to the advance of the money, directed the registry to be searched from 1794, when Hodgson the settlor died, the search was made and no incumbrance found. Shortly after the death of Hodgson the son, Dean brought an ejectment for recovery of the mortgaged premises : to stay which ejectment the plaintiff (who was the son and heir of N. B. Hodgson the mortgagor, and the next tenant in tail under the settlement) applied to the Court of Chancery for an injunction, which was granted of course. The defendant now moved to dissolve the injunction.

The Vice Chancellor.—The material question in the case is, whether the defendant is a purchaser or mortgagee with or without notice of the plaintiff's title. It is said, by the defendant, that he is a mortgagee without notice of the settlement made by the grandfather in 1755. It appears, on the answer, that the defendant, on the occasion of lending his money upon mortgage to the father of the present plaintiff, (the estate being situated in the county of York, which is a register county,) wrote, by his solicitors, to the Deputy Register of the North Riding, requesting that he would make a search in the registry with respect to that estate, from the year 1794 to the year 1815. It also appears, that the reason why 1794 was fixed upon as the limit of the search, was, because the grandfather died in 1794, upon whose death, N. B. Hodgson, who represented himself as seised in fee, became possessed of the estate. The Deputy Register accordingly did make a search, and wrote to the solicitors of the defendant, that there was no instrument found upon the registry affecting the estate in question. Now, it is said, that inasmuch as the defendant directed a search to be made, it must be taken that he had constructive notice of the whole register; and an authority is cited, which is supposed to have come from Lord Redesdale, in a case referred to in the Irish reports. *Bushell v. Bushell*, 1 Sch. & Lef. 103. On looking to that case, however, it does not appear to me to touch the question; and, when the expressions which Lord Redesdale has used are considered, it is plain that he had no idea of deciding such a point as the present. The question now raised is therefore without authority, and depending entirely on general reasoning and principle. *It is admitted, as it must be, that Dean was not obliged to search the registry at all.* This is not a case, therefore, in which construc-

them. The rule appears to be the same on motion, where there is to be a sale to raise the mortgage-money; this is a first principle, and not to be argued, and depends on the denial of notice (T).

tive notice can prevail. A notice to affect Dean, must be an actual notice. Now, it is plain, that Dean had no actual notice. Where the search of the register is generally admitted or proved, (I use the expression generally admitted or proved) there it will be intended, as a rule of evidence or presumption, that the party making the search had notice of the whole contents of the registry. But that is not constructive notice; the doctrine proceeds upon a totally different principle. The admission of a general search of the register, is an admission of a search which, according to the rules of evidence and legal presumption, is to fix the party with the knowledge of all the contents of the register so admitted to be searched. Now it is perfectly plain, that no such presumption can be made here: the circumstances of this case absolutely exclude such presumption. Dean had not notice of the registry of the deed of 1755. His admission of the search of the register is not general, but expressly confines the search to the period subsequent to January, 1794, and therefore negatives any search prior to that date. For these reasons, I am of opinion that Dean is a mortgagee without notice; and he is therefore entitled to have this injunction dissolved. The question was afterwards brought before the Lord Chancellor upon an appeal motion. His Lordship was clearly of opinion, that notice of the contents of the registry during a particular period, was not to operate as notice of entries contained in it relative to an anterior period. *Hodgson v. Dean*, in Chan. July, 1835, MS.

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From these remarks on the registry acts we collect, 1st, that registration is not notice; 2d, that a mortgagee or purchaser is not bound to search the register, but if he does so he will be held to have notice of all incumbrances on the register within the period of his search; 3d, that a mortgagee having the legal estate may tack further advances to his security, notwithstanding a mesne mortgage may have been duly registered; 4th, that an equitable incumbrancer, without notice *aliunde* the registry, may over-reach a prior equitable and registered mortgage, by purchasing in a legal estate created previously to both incumbrances; 5th, that actual notice of an unregistered deed will not bind the party to whom such notice is given with the incumbrance created by it, unless his own incumbrance be not duly registered. But 6th, that these positions are in effect the very reverse in Ireland, on the ground, that the Irish registry act declares that every deed in Ireland shall have priority according to the time of its registration.

Recapitulation.

(T) In *Chandos v. Brownlow*, 2 Ridgw. P. C. 422; it was held, that a purchaser for valuable consideration without notice, having the legal estate in him, can always defend himself in a court of equity, whether the bill be filed against him for discovery or relief, and whether the prayer of that discovery or relief be founded on a right derived from particular contract, from the common law, or from positive and explicit provisions of a statute. This, Lord Chancellor Fitzgibbon considered to be clear, on a broad principle, as old as the institution of a court of equity, a principle which did not admit of excep-

Assignee of purchaser not obliged to discover deeds.

*Recital of deed
by date and
parties, notice*

Thus, where a plaintiff's bill was to set aside a conveyance made to the defendant by A., on the ground that the defendant

tion, which had not been shaken for more than a century, and could not be questioned without shaking to its foundation the whole system of equitable jurisprudence, which had been defined and established by the collected wisdom of ages. This rule is general, extending to every purchaser for valuable consideration without notice of the plaintiff's title; and the reason of it is, that a purchaser without notice is not bound in conscience to assist the right owner in the legal recovery of the subjects purchased under such circumstances, *Hoare v. Parker*, 1 Cox, 227; and the assignee of a mortgagee or purchaser for a valuable consideration without notice, is entitled to the same protection. *Sweet v. Southcote*, 2 Bro. C. C. 66. S. C., 2 Dick. 671. *Lowther v. Carlton*, 2 Atk. 139. 242. S. C. Ca. temp. Talb. 186. Barn. 358. Et vide cases on same rule, in 8 Vin. Abr. 546, and *Hardy v. Reeves*, 5 Ves. 426, where a debtor claiming as mortgagee, denied notice of the plaintiff's title, which was neither set forth nor proved: an inquiry, with a view to affect him with notice, was refused, first, upon a petition to vary the minutes, and again upon a re-hearing; but an inquiry was granted as to what money he had advanced on the security.

*Of obtaining
possession of
title-deeds.*

It frequently happens that a person has a title to an estate from which he is debarred by reason of the documents and papers respecting it being detained by another. We propose to consider his remedy, first, at law, and then in equity.

*In an action
of trover.*

In a court of law an action of trover may be maintained for title-deeds after demand and refusal, *May v. Harvey*, 13 East, 197, provided the plaintiff can prove a right of property and a right of possession to the same. *Gordon v. Harper*, 7 T. R. 9. Thus, where A. having agreed to purchase of B. the remainder of a term, and the latter delivered to him the lease, in order that he might get an assignment made out; and A. then obtained an enlargement of the term from the original landlord, and refused to accept an assignment, or pay the full price agreed on, because B.'s under tenant had removed some fixtures. It was held, that B. might insist on A.'s accepting the assignment, and after demand and refusal of the lease, might maintain trover for it. *Parry v. Frame*, 2 Bos. & Pul. 451. And it has been held, that the person who is entitled to the land has a right to the title-deeds of that land, *Hooper v. Ramsbottom*, 6 Taunt. 14; and therefore where A. sold an estate to B., who paid part of the purchase-money, and the title-deeds were deposited with C. as an escrow, to be delivered up to B. when he paid the residue of his purchase-money; and A. obtained possession of them again, and pledged them to D. for a valuable consideration; it was held that B. on tendering the remainder of the purchase-money, was entitled to recover the deeds from D. *Hooper v. Ramsbottom*, 1 Marsh. 414. But to entitle the plaintiff to recover, he should have a better right to the deeds than the defendant: and if in the assignment or conveyance there be no grant of deeds to him, he cannot recover. In *Yea v. Field*, 2 T. R. 708, a purchaser of a small part of an estate took a covenant from the vendor, that he (the vendor) would produce the title-deeds whenever it should be necessary. The deeds

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was no real purchaser (r), or, if he were, yet, before his purchase, he had notice that the estate was subject to a trust of trust contained in that deed.

(r) *Hall v. Atkinson*, 1 Eq. Ca. Abr. 333, 4. [S. C. 2 Vern. 463, et vide ante, 579.—Ed.]

afterwards came into the vendee's possession, on his taking a mortgage of the other part of the estate, and he then assigned the mortgage to a third person, not mentioning the deeds. Such third person, it was held, could not maintain trover against the vendee for the deeds. And trover lies for an unstamped agreement, if it can, upon payment of the penalty and stamp duty, be stamped and rendered available. *Scott v. Jones*, 4 Taunt. 865. So also a vendor may maintain an action of trover for the abstract and other documents of title delivered to the purchaser, if the purchase goes off, *Roberts v. Wyatt*, 2 ibid. 268; and note, in trover for a bond the plaintiff need not shew the date; for the bond being lost or converted, he may not know the date; and if he should set out the date, and mistake it, he would fail in his action. Cro. Car. 662. If the defendant find the bond, and receive the money, an action of account will lie against the receiver, and not trover. Cro. Eliz. 723.

If deeds or writings come to an attorney in the way of business, and he afterwards detains them, the court of common law, of which he is an officer, will, on motion, make a rule upon him to deliver them back to the party, on payment of what is due to him; and particularly when he has given an undertaking to redeliver them. *Anon.* 1 Salk. 87; et vide 1 Chit. Rep. 98. Say. Rep. 125. *Strong v. Howe*, 1 Str. 621. S. C. 8 Mod. 339. And when something is to be done for which a *mandamus* would lie, as the giving up of court rolls, &c. the court will entertain a summary jurisdiction over an attorney, in obliging him to deliver up the deeds on satisfaction of his lien: and, if a third person appear to be interested therein, the court will take a security from the person to whom they are delivered, to produce them on demand for the inspection of such third person. *Hughes v. Mayre*, 3 T. R. 275, and see *Marshall's case*, 2 W. Bl. 912. *Grubb, Ex parte*, 5 Taunt. 206. *Corpus Christi College, Ex parte*, 6 ibid. 105. But, in general, where writings come to the hands of an attorney, in any other manner than in the way of his business as an attorney, the party must resort to his action. *Anon.* 1 Salk. 87. And accordingly in a late case (*Cox v. Harman*, 6 East, 404. S. C. 2 Smith's Rep. 409) the court refused to proceed summarily against a steward who was an attorney, to compel him to account before the Master for receipts and payments in respect of a mortgaged estate, and to pay the balance to his employer, and deliver up on oath all deeds, writings, &c. relative to the estate; this being the proper subject of a bill in equity, and not a case for a *mandamus*, to compel a steward of a manor to deliver up court rolls, &c. So the court will not compel an attorney, upon a summary application, to deliver up, on payment of his demand, a lease, put into his hands for the purpose of making an assignment of it; there being no cause in court, nor any criminal conduct imputed to him in respect of it. *Lowe, Ex parte*, 8 East, 237. Nor will the court make an order on an attorney to deliver up a deed, which he holds as party and trustee. *Grubb, Ex parte*, *ubi supra*. And where an attorney had deeds, &c. in his

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continued.

Attorney will be
ordered to deliv-
er up deeds,
when.

for the plaintiff, and that a lease in the defendant's custody mentioned it; the defendant swore himself a purchaser without

custody, of two co-defendants, the Court of Common Pleas would not refer it to the prothonotary to ascertain to which of them he should deliver the deeds on his paying the attorney's debt and costs. *Duncan v. Richmond*, 7 Taunt. 391. S. C. 1 J. B. Moore, 99.

*Of subpoena
duces tecum.*

It is also observable, that if a witness in a cause have in his possession any deeds or writings which it is deemed necessary to produce at the trial, a *subpoena duces tecum* may be issued, commanding the witness to bring them with him; or if deeds or other writings are in possession of the opposite party, his attorney or agent, notice may be given to such opposite party, his attorney or agent, to produce them; which, however, he will not be compelled to do in prejudice of his own rights. The writ of *subpoena duces tecum*, is the regular and established process of the court of common law; and though it was formerly doubted (1 Esp. Rep. 43. *ibid.* 405), yet it is now settled, that this process is of compulsory obligation on the witness, to compel him to exhibit the deeds or writings required of him, if he has them in his possession, unless he can produce a lawful or reasonable excuse for withholding them; of the validity of which excuse the court and not the witness is to judge. *Awey v. Long*, 9 East, 473. And a person in possession of any paper, who is served with a *subpoena duces tecum*, is bound to produce it, whether the paper belong to him or not (6 Esp. Rep. 116; and see 1 Campb. 14. 1 Holt. N. P. 141, *in notis*), or though there be a regular way prescribed by law for obtaining it. The court, however, in all such cases, will exercise its discretion in deciding what papers shall be produced, and under what qualifications in regard to the interest of the witness. 1 Esp. Rep. 239.

*Of bill in equity
for delivery
of title-deeds.*

But in a court of equity, it is conceived, the most complete relief can be obtained. In an action of trover damages only can be recovered—the bare value perhaps of the stamp and parchment of a deed, without which the title to property of immense magnitude may be rendered unmarketable and insecure. In equity a bill lies for the delivery up of deeds unjustly detained; and the court will decree the defendant to deliver them up accordingly, if his defence be not substantiated; “for,” says Lord Hardwicke, “in an action of trover damages only can be obtained for the detention of the deed, but not the deeds themselves,” *Jackson v. Butler*, 2 Atk. 306; and it is the imperfection of the law in actions of trover and detinue, observes another noble Lord, that seems to be the ground of the jurisdiction in Chancery, for the specific delivery of the thing itself. *Vide Walwyn v. Lee*, 9 Ves. 33. On this principle it was said, in a recent case, “that the delivery of title-deeds is equitable relief, and the Court of Chancery having in that respect jurisdiction will do complete justice. The possession of the title deeds is incidental to the possession of the estate, but cannot be recovered with the estate at law. A court of equity therefore will give the title-deeds to him who has at law recovered [qu. entitled to] the possession of the estate.” *Crow v. Tyrrell*, 3 Mad. Rep. 183. If an instrument ought not to be used, it is against conscience for a party to retain it, as he could only do so for some sinister purpose, *Rederd.*

notice of any trust, and *that the lease mentioned no such trust*. The plaintiff replied. The defendant proved his purchase.

Tr. Pl. 104, n. (c), 3d edit.; and therefore he will be ordered to deliver it up. *Ib.* So where, on a bill to have deeds delivered up, the defendant stated himself to be a trustee for mortgagees, but did not name them, he was decreed to deliver up the deeds and pay costs. *Scarborough v. Parker*, 1 Ves. jun. 267. But it seems necessary that all persons concerned in the title-deeds should, in cases of this kind, be made parties to the suit. *Ibid.* And a court of equity, without any cause in court, has, from its general jurisdiction over a solicitor, ordered deeds in his hands, for the purpose of suffering a recovery, to be delivered up. *Usbridge, Ex parte*, 6 Ves. 423; and see *Strong v. Howe*, 1 Str. 621. 8 Mod. 339; and see, on this subject, *Smith, Ex parte*, 5 Ves. 706. For farther on bills for discovery, and delivery of title-deeds, see 1 Madd. Ch. 225. 2 *ibid.* 390, 2d edit., and *Marriot v. White*, where a stranger claiming an interest, was decreed entitled to the deeds on petition under the circumstances. 1 Sim. & Stn. 20. In general there must be a schedule before the court to enable it to order the production of deeds, but this applies only to cases of discovery. *Anon.* 6 Madd. 97.

On the subject of this note it is further observable, that in a late case it was laid down by Abbott, C. J. as perfectly clear, that a man is not bound to produce his title-deeds to an estate. A court of equity would not compel him to do so, and in the case before him, (that of a composition deed) the same principle was applicable. *Harris v. Hill*, 3 Stark. 140. So the Court of King's Bench in another case said, that parties were never compelled to produce their title-deeds. If a *subpoena duces tecum* is served, the party must bring his deeds into court, in obedience to the *subpoena*; but if he states that they are *his* title-deeds, no judge would ever compel him to produce them. *Pickering v. Noyes*, 1 Barn. & Cress. 262. In this case, in an action to try the title to land, a rule had been obtained to compel the plaintiff or his landlord to permit the defendant to inspect or take a copy of one of the landlord's title-deeds to his estate; but the rule was discharged, with costs. *Ib.* 263. Yet it seems that a rule will be granted for inspection of a lease in order to obtain the names of the witnesses to *subpoena* them. 2 Chit. Rep. 230. The court, however, will confine their order for inspection of a deed to particular parts of it. *Ramsbottom v. Cooper*, *ibid.* 231.

The general rule is, that a plaintiff is entitled to the production of a deed which sustains his title, but he has no right to the production of a deed which is not connected with his title and which gives title to the defendant. *Sampson v. Swittenham*, 5 Madd. 16. In one case an opinion of counsel was ordered to be produced, where it was taken by a tenant, with reference to his landlord's title, and where the case was stated for the benefit of both parties. *Attorney-General v. Berkeley*, 2 Jac. & Walk. 291. The courts will take care that a party shall not be called on without good reason to produce his securities, for they watch with jealousy proceedings instituted for that purpose, and will require an unanswerable case to warrant their interference in making an order for the production of deeds and papers in the hands of another person. *Vansittart v. Barber*, 9 Price, 641.

Late cases on the production of deeds.

Implied as strong as express notice. Arg°.

and the plaintiff proved no notice upon him. But, at the hearing, it was insisted, that he ought to produce the lease to shew there was no mention of the trust; besides, the answer being replied to, it was said, he was bound to prove it, which he could not do, without shewing the deed; for he took upon himself to judge what deed would amount to notice, and what would not, which he ought not to do. For, implied notice being as strong as express notice, if the lease mentioned *only the date and parties of another deed, which mentioned a trust*, it was deemed an implied notice, which the defendant might not know; and, therefore, the court ought to see it, that they might judge of it.

But defendant not obliged to produce deed which would weaken his title.

But it was argued (s) on the part of the defendant, that being a purchaser, by the rule of the court he was not obliged to produce this lease, or shew his title; that this was an attempt to alter that rule, by a side-wind, and that it was as easy to say in a bill, it was in some of the deeds, as in any one in particular, and then he must expose them all, which would be of dangerous consequence to purchasers. It was replied, that if the deed were not produced, then, if one had a mortgage with a proviso of redemption, yet if the mortgagee was hardy enough to swear it an absolute purchase, and the mortgage had no counterpart, he must lose his estate.

Unless plaintiff make some proof tending to falsify answer.

The Master of the Rolls thought, that as this case was, the deed ought to be produced; but the Lord Keeper held otherwise, saying, it was a side-wind to make a purchaser expose his title (t), which his Lordship would not do, *unless the plaintiff had made some proof*, tending to falsify the answer, to induce him to it (v).

(s) *Hall v. Atkinson*, 1 Eq. Ca. Abr. 353, pl. 4.

(t) *Ibid.*

Reference to master.

(U) It would, perhaps, in the present day, be referred to a Master to inspect the deed, and report to the court whether the mortgage, which the plaintiff alleges contains a trust for his benefit, really does contain such a trust, in the same manner as when a disinherited heir claims under a dormant entail, in which case the deeds are directed to be brought before the Master, to see whether he can discover any thing for the heir's advantage. *Suffolk v. Howard*, 2 P. Wms. 177. *Tanner v. Wise*, Forr. 287. S. C. 3 P. Wms. 296.

And where, upon a decree for a foreclosure *nisi* (u), the defendant moved, that the plaintiff might lay the deeds before counsel, in order to have the mortgage assigned to one who would advance the money, it was insisted, that such an order was never made. And so it was held; and the Lord Chancellor accordingly made an order that the plaintiff should give the defendant a copy of the mortgage deed, at the defendant's charge, but would not oblige him to produce the title-deeds.

Mortgagee not compellable to produce title-deeds (u 2).

But where the mortgagee consents to a sale, he thereby submits to do every thing which is necessary to a sale; in such case, therefore, he will be compelled to produce the title-deeds; the inspection of them being necessary before a sale can be made (x).

Unless he consents to a sale (v).

But a refusal to produce the title-deeds (y), in case of a decree of foreclosure *nisi*, seems to furnish good reason to enlarge the time to redeem, if the defendant applies to the court on that head.

But refusal good reason for enlarging time to redeem.

If A. purchases an estate (z), with notice of an incumbrance, or that it is redeemable, and then sells to B. who has no notice, who afterwards sells to C. who has notice; by this the notice to A. the first purchaser, will not be revived; for, if it were, an innocent purchaser, without notice, might be forced

A. sells to B. with notice, B. sells to C. without notice, and he sells to D. who has notice, notice not revived.

(u) *Anon. Mos. 246.*

temp. Talb. 187. S. C. 2 Atk. 139.

(x) *Ibid.*

[Barn. C. C. 351.] Et vide *Brandlyn*

(y) *Ibid.*

v. *Ord*, 1 Atk. 578. *Sweet v. South-*

(z) *Harrison v. Forth*, Pre. Ch. 51.

cote, 2 Bro. C. C. 66.

Et vide etiam *Lowther v. Carlton*, Ca.

Reeves v. Reeves, 9 Mod. 128. 132. Mr. Fonblanque subjoins a query to this case of *Hall v. Atkinson*, 2 Fonb. Trea. Eq. 491, n. (k), 5th edit. considering it difficult to support the decision with reference to the case stated.

(U 2) So in a late case, where a depositary of an assignment as a collateral security, refused to produce it, on being summoned as a witness under a *subpoena duces tecum*, the Lord C. J. ruled that he was not bound to produce the assignment. *Schlencker v. Moxey*, 3 Barn. & Cress. 791, et vide on this subject, 3 Stark. Evid. 1772.

(V) Or it be necessary for the defence of the mortgagor's title. And so, on the other hand, a mortgagee has no right to shew the title-deeds to a stranger, ante, vol. i. 213, n. (8).

to keep his estate; he could not sell, and would be accountable for all the profits received *ab initio*. But the interest must be the same in *every* respect, or the principle does not apply (w).

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A. without notice, sells to B. with notice, B. not deprived of A.'s defence.

Upon this ground (a), where A. who was entitled to the equity of redemption in certain lands, had brought his bill against the representatives of B., who was the *mesne* purchaser, and likewise against C., who was the *puisne* purchaser; A. had not replied to the answer of the representatives of B., and the question was, whether they should not have been brought before the court as proper parties? *Et per* Lord Hardwicke, Chancellor, the representatives of B., deny that he (B.) had any notice of A.'s title at the time he purchased, and it is admitted on all hands, that C. who purchased of B., had notice of the title; now, if I should go on with this cause, I should deprive C. of the benefit he would have from the defence which is set up by the representatives of B. It is like the cases at law by warranty, &c. where one defendant is allowed to pray in aid the evidence of another defendant, who has an interest in the thing contested, if it is of use or advantage to him in strengthening his own case. And for this

(a) *Lowther v. Carlton*, Ca. temp. Talb. 187. S. C. 2 Atk. 139. [241. Barn. C. C. 358. Forr. 187.—Ed.]

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continued.

How one person affected with notice to another.

(W) But if A. having notice that lands were contracted to be sold to B., purchases those lands, and takes a conveyance to his son and heirs, though the son may have no notice of B.'s contract, yet the notice to his father will affect him. *Merry v. Abney*, 1 Ch. Ca. 38; et vide ante, 564. So if one, who purchases for another, have notice of a dormant incumbrance, it will affect the very purchaser. *Ibid.* And a fine and non-claim will not bar a person claiming under a trust, if the person to whom it is levied have notice of the trust. *Kennedy v. Daly*, 1 Sch. & Lef. 379. In like manner if a trustee convey to a person with notice, and takes a re-conveyance, it will operate nothing. *Ibid.* So if the person to whom he conveys hath no notice, yet on the re-conveyance the trust will attach, though it did not attach on the person to whom he conveyed; nor would it have attached if that person had conveyed to another without notice. *Ibid.* And if one taking from a trustee with notice levies a fine to strengthen his title, this will not bar the *cetui que trust*. *Ibid.* et vide ante, vol. i. 487, in *notis*. The same principle was again acknowledged in *McQueen v. Farquhar*, 11 Ves. 478, where it was distinctly laid down, that a person affected with notice will have the benefit of the want

reason, his Lordship allowed the objection, for want of parties in not bringing the representatives of B. before the court.

Again, where a bill was brought to discover whether the defendant (b), who was assignee of a mortgage, had not notice that the original mortgagor was only tenant for life, stating that the title-deed, by which this appeared, was in the defendant's hands; the defendant pleaded that he was assignee of the mortgage, for valuable consideration, and through many assignments from persons who had no notice. It was argued, that this plea was not good; for it should have stated, whether the defendant personally had notice. But the Master of the Rolls allowed the plea, holding that the plaintiff could not call upon the defendant to shew whether he had or had not notice; for whether he had, or had not, was immaterial, if those through whom he claimed had not, he having a right to avail himself of their being purchasers without notice.

Notice immaterial to person claiming through those who have no notice.

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The *general* principle held out in the preceding cases, that a mortgagee may, in a court of equity, protect himself from the discovery of title-deeds, *if he denies notice*, has been considerably shaken in a modern adjudication (c) (x). The bill

Tenant in fee on his daughter's marriage, settles estate to himself for life, remainder to his daughter for

(b) *Sweet v. Southcote*, 2 Bro. C. C. 66. [S. C. 2 Dick. 671.—Ed.] (c) *Strode & Wife v. Alice Blackburne*, 3 Ves. 222. Feb. 12th, 1796.

of notice to the intermediate parties; and therefore a purchaser with notice, from a purchaser who bought without notice, may shelter himself under such purchaser without notice, provided it be the same interest in every respect. Et vide S. L. Redesd. Tr. Pl. 224, 3d edition.

In an old case a leasee for a long term entered into a new agreement for a lease, and thereby took a new lease of the same lands from the lessor for a less term than he had before, but did not cancel the old lease, and afterwards the leasee assigned the old lease to one who had no notice of the subsequent transaction, it was made a question whether such old lease should be good against the lessor. *Coker v. Neagle*, Harc. MSS. 8 Bro. P. C. 412, Toml. ed. It would surely be a novel case if the leasee, by any contrivance of this sort, could bind his lessor to an agreement, the subject of which was indubitably merged, if the writing itself were not cancelled.

Lessee cannot over-reach lessor by assigning to one without notice.

(X) The learned author here enters into a disquisition, which occupies this and the twenty-eight succeeding pages. It concerns certain passages attributed to Lord Rosslyn, in delivering his judgment in the case of *Strode v. Blackburne*. The adjudication was however not final, as his Lordship ordered

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Point discussed in next twenty-eight pages, stated and explained.

life, remainder over. He then makes mortgage in fee to A. who has no notice of settlement, and delivers to him deeds. Bill by daughter in possession against A. for discovery and redelivery of deeds. Plea, mortgage without notice, ordered to stand for answer, with liberty to except (x 2).

stated the following case: A., upon the marriage of his daughter B. with C. the plaintiff, settled certain freehold estates to the use of himself for life, remainder to the use of B. for life, remainder to the children of the marriage as tenants in common in tail, and for default of such issue as to part to his son D., as to the rest to his daughter B. and her husband in fee. A. continued in possession till his death, then B. took possession and continued it from that time and became entitled to the possession of the title-deeds, but they had been by A. or D. delivered to the defendant, and she had them in her custody. The defendant set up a mortgage by lease and release from A. for 1000*l*. the bill charged that neither of the plaintiffs were privy to the mortgage, or that they did not know of it, or that the deeds had not been delivered to the

the cause to stand over with liberty to except, implying, that his observations and statements were not to be taken as settled law, until upon further consideration they were confirmed. The objectionable passage is this, "the plea of purchase for valuable consideration without notice is a shield to the possession; and it is very difficult to imagine a case, in which it can be used for any other purpose than to defend the actual possession; for, *ex hypothesi*, the defendant is in possession of that which he seeks by the plea to defend," see post, p. 638, 9, consequently, to a defendant, who is out of possession, the plea of being a purchaser for a valuable consideration, without notice, will not be of any avail. This is certainly confining the plea to a very limited number of cases, and is little accordant with the extensive principle of favor and protection which courts of equity uniformly profess to shew to a *bona fide* purchaser without notice. To this passage the learned author objects; and submits, with much force of argument, that in the previous decisions possession had nothing to do with the plea, see post, 648. He concludes, by considering the observations of Lord Rosalyn (so far as they attempt to confine the doctrine of notice in this particular, to cases where the defendant is in possession only) as bad law; and this conclusion has been confirmed by the subsequent case, mentioned in the note to pages 652, 3, 4, post.

(X 2) In *Putland v. Burrows*, 3 Bro. P. C. 71, a tenant for life pretending to be seised in fee, made a mortgage in fee for 3000*l*. and fines and recoveries were levied and suffered by him and his wife to the uses of the mortgage-deed. The mortgagee, upon his son's marriage, conveyed the mortgage lands, subject to the proviso for redemption to uses in strict settlement and died. The mortgagee's son filed a bill for foreclosure against those claiming under the mortgagor. The defendants admitted the mortgage, but insisted on a settlement made previous thereto, whereby A. was only tenant for life. They called no witnesses to prove the settlement, or any copy or notice thereof on the mortgagee, wherefore an account was ordered in the Lords, contrary to a decree in the court below, which decree was reversed, 3 Bro. P. C. 81.

defendant till a considerable time after the death of A., and prayed that the defendant might be compelled to deliver up all the title-deeds and evidences in their hands or power relating to the premises. The defendant, as to so much of the bill as sought a discovery of the title-deeds, pleaded the mortgage, and the plea contained averments that the defendant had no notice of the settlement, that the money was still due, and the other usual averments, and was supported by an answer denying notice. On the behalf of the defendant it was contended, that against a purchaser for a valuable consideration without notice, the court had no jurisdiction. But the Lord Chancellor (Loughborough) over-ruled the plea as to the discovery, and ordered it to stand for an answer with liberty to except.

*Argument
against Strode
v. Blackburn.*

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As the judgment in this case, *if it be law*, annihilates in a great degree that which had been previously considered by judges of the most distinguished eminence, *as an infallible rule in a court of equity*, I cannot suppose that had this case been again agitated on an exception to the answer, the noble Lord who made the order would have dismissed all attention to the antecedent decisions on the point (d); and I trust its importance to purchasers, *under which denomination mortgagees are classed*, will exempt me from being thought digressive from the subject of this treatise, in offering such observations as appear to me to arise thereon. If I understand the scope of the arguments of the noble judge who decided this case, I take it to be as follows:

*Effect of last
case on previous
decisions.*

His Lordship first stated the importance of the question in its effect on settlements, by enabling a tenant for life, with whom, in the ordinary course of business, the title-deeds rest, by a bad mortgage to defeat all the objects of the settlement.

*Only use of plea
of purchase
without notice,
is to defend
actual possession (Y).*

(d) Ante, vol. i. 190, 1. [infra, 646, et seq.—Ed.]

(Y) It is a shield to defend the possession of the purchaser, *Patterson v. Slaughter*, Amb. 292; not a sword to attack the possession of others, see 3 Ves. 225.

*Argument
continued.*

His Lordship then suggested "that *an idea had occurred to him, and that, upon full consideration, it remained in his mind, that the plea of purchase for a valuable consideration was a shield to the possession, and that he found it very difficult to imagine a case in which it could be used for any other purpose than to defend the actual possession; and his Lordship observed, that it was very truly said by the Attorney-General, that in the plea it was not said it was to maintain the possession, that no such statement could be found in any plea; for ex hypothesi, the defendant was in possession of that which he sought by the plea to defend.*"

*Deeds follow,
and are incident
to estate in
hands of owner.*

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His Lordship said, "the deeds were incident to the possession. They were not considered in law as chattels, but followed and were incident to the estate in the hands of the owner (a a). At law they belonged of right to the owner, and did not go to the executor." *It was against all conscience to refuse to describe that, which the other party, by the admission of the defendant, had a right to recover. His Lordship admitted, "that if a court of equity was to make a mortgagee discover how he made out his title to that land of which he was in possession, there would be no conscience, no equity, no good discretion, even to enable the court to call upon the defendant, having paid money for the land without any notice, a title perfectly founded on conscience, if it had any foundation, to set forth his title."*

*Mortgagee not
compellable to
set out estate
by metes and
bounds, if not
in possession.*

His Lordship said, "there were cases, where the court would have no hesitation to make him, the mortgagee, describe the thing, of which he was in possession. If a mortgage was made by the owner of an estate, partly settled, partly unsettled, and during the possession of that owner the boundaries had been confounded, if a person under the settlement filed a bill to compel the mortgagee to set out, not the title, by which he claimed, *but the metes and bounds of the estate, subject to his mortgage, no such idea could go to the extent, the defendant supposed.*" (a b)

(a a) [Et vide S. L. ante, vol. i. 304.—Ed.]

(a b) [See, as to this, post, 649.—Ed.]

His Lordship observed it came to this: the assumption must be, that *she had a right to the deeds as a substantive property*; that was as chattels. And his Lordship asked, "where was the distinction between this and the common case of goods, for which trover or detinue lay? A person averring that he was in such circumstances, that he could not describe them, required an account to be given to enable him so to do. Suppose a box of jewels was *pledged* by a person, not the owner, but a mere bailee, the pawnee supposing the person in possession actually the true owner, and there being no reason to think otherwise: there would be no difficulty in a court of equity in *obliging him to explain and set out that property*, of which *he admitted* the title to be in another, only claiming the value, for which it was pledged; a description, that would make it the subject of an action at law." (a c)

Bill of discovery maintainable for goods whereof trover lies, on averment that owner cannot describe them.

His Lordship said, "it was remarkable, and he did not blame the pleadings for it, that though, where the defendant *was in possession of the lands*, he must state, that he made the purchase from a person in actual seisin and possession under a title of ownership, and it was so stated in this plea, as to the land, it was not so stated as to the title-deeds; for the language was, that he had the *disposal* of them: *so would a carrier: so a mere bailee*. That it was not a statement, that he was the owner; nor could it be so stated with truth and good conscience; for a tenant for life could not be said to have the ownership of the deeds. It was a *relative ownership, as incident to the title of the lands*. The title and ownership were in *the plaintiff*. The right was claimed, not as to a personal chattel, but *as a right incident to this mortgage*; and she was attempting to put the plaintiff under a disadvantage *by retaining that, with regard to which she could have no profit*."

Plea must state that purchase was made from a person in actual seisin and possession.

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His Lordship said, "it was pressed in the argument, and ought to be considered, *what these title-deeds might be*. If there were none of which the defendant could make *any advantage*, she was *without any beneficial interest or profit* to

Equity will prevent improper use being made of term.

(a c) [As to this, see *Howe v. Parker*, 1 Cox, 424. S. C. 1 Bro. C. C. 378, and post, 650.—Ed.]

Argument
continued.

herself, retaining what *might* be a profit and advantage to the plaintiff. But there might be among them a term, which either might be attendant upon the inheritance, as a satisfied term, or a term amounting to a freehold, of which she might make advantage. If a satisfied term, *it would be absurd to let it remain* in the hands of the defendant; for the only effect would be to leave to the defendant what could be of *no advantage to her*, but only a vexation to the plaintiff; for if *she attempted to avail herself of it improperly*, though that might not appear to a court of law, it would appear to that court and *that court would interfere* to prevent that improper use of it. On the other hand, if it amounted to an estate of *freehold*, which would enable her to get possession, he did not know that *that court* could compel her to deliver up that. Till the discovery was made, it was impossible to know whether any relief could be given."

Situation of
parties viewed.

In order to form an opinion upon the propriety of the order made in this case, it is necessary to advert for a moment to the situation of the parties before the court, and then to inquire upon *what principles* courts of equity have *hitherto* acted in *such* cases. The parties contending were on the one side a mortgagee, who must be assumed (until the contrary be proved) to have used all necessary inquiries to ascertain the validity of the title of the person with whom he was contracting to give the security offered, and to have taken the *only precautions* that *can be pursued* in dealing with real property; that is, who had dealt with a person *in possession*, had secured to himself the possession of the title-deeds, and had paid a *full consideration* for the property to which they related. On the other side, a person claiming also for a *valuable consideration* under the same party, by virtue of a previous settlement. One of these parties must suffer a loss. No reason existed as between two innocent persons, in a *moral view*, why that loss should be shifted from the one and thrown upon the other (e), unless the

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(e) Per Lord Macclesfield, 1 P. Wms. 74, 7, et vide ante, vol. i. [160, his Lordship's words are, "If one must suffer, it must be he who has not used due diligence in looking into the title,

but whenever one of two innocent persons must be a loser, the rule is, *qui prior est tempore potior est jure.*"—Ed.]

laws of property so ordered it. "An hardship ought not to be decreed against one, in order to prevent its falling upon another." Now, it was clear, that *at law* the person claiming under the settlement must, if the settlement was not produced, eventually have been the sufferer, for the mortgagee was in possession of such a title as would have enabled him to recover the possession against the person entitled under the settlement, if *that could not be produced*. The production of the mortgage-deed *would have entitled him to recover in ejectment*. Therefore no defence could have been made without the interference of a court of equity to compel a discovery and production of the settlement. The settlement, therefore, in this case was, as described in a beautiful allusion by that great judge Sir Matthew Hale, *tabula in naufragio*. There was no salvation for either party, but in the possession of this plank, with the possession of it, the title of either party was irresistible.

Argument
continued.

Under these circumstances what jurisdiction had a court of equity? Such court, it is apprehended, is dormant, unless an existing equity, preponderating on one side, calls it into action. Where was that equity in this case? The party desiring to retain, and the party wishing to acquire the settlement in question (for that was the only material deed) stood precisely in equal equity (z), each was justified in law and morality in struggling for the subject which both had purchased; consequently there was no motive for such court to act. Such court, it appears to me, must lose sight of the elements of its constitution, if it acted on such an occasion. The question then of ownership of the deeds was entirely out of the case; but if the ownership had been material, the legal owner of the deed was not before the court, for it is apprehended the trustees of a settlement to uses are the legal owners of the deeds; with them they ought to rest, and if in the ordinary course of

Their rights
considered.

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Trustees of settlement ought
to retain title-deeds (A).

(Z) In which case the rule, *Qui prior*, &c. is applicable.

(A) This would prevent many opportunities of committing fraud. But the owner of an estate, who, on his marriage, has settled the property on himself for life, with remainders over for the benefit of his issue, is not always willing to deliver up deeds, which he considers himself entitled to as the head of his

Of persons entitled to custody of deeds.

Argument
continued.

business it is otherwise, "it is a usage better in the let than in the observance," as it leads to great fraud.

These are the principles on which it is apprehended courts of equity have acted in cases of this nature, from their first institution to the present time.

Equity will not
disarm *bonâ
fide* purchaser
without notice,
but will assist
him.

The law upon this subject is clearly laid down by Lord Nottingham, in the case of *Sir William Basset et al. v. Notworthy (f)*. The plaintiff W. B. entitled himself as son and heir of E. S., who was the only daughter and heir of J. K., who was brother and heir of H. K., whose estate the lands were formerly. The defendant E. N. was a purchaser of these lands from persons claiming under the will of the said H. K., of which will the plaintiff W. B. alleged there was a revocation by some subsequent deed or will, and for a discovery thereof, and what E. N. really paid for the purchase, and what deeds and writings he had, &c. the bill was exhibited. The defendant pleaded another bill brought in the Exchequer for the same matter, and after a full hearing dismissed, and the dismissal signed and enrolled; and further, that he was a purchaser for a valuable consideration *bonâ fide* paid without notice of any revocation. The case was first brought on before

(f) 25 Car. 2. 1673. Finch's Rep. 102. [ante, vol. i. 478, in *notis.*—Ed.]

family: and trustees themselves are sometimes averse to risk all accidents which might befall the deeds while in their possession. *Prima facie* a person in possession of an estate, under a title that gives a freehold interest at the least, has a right to the custody of the title-deeds, *Ford v. Peering*, 1 Ves. jan. 72; *Webb v. Lymington*, 1 Eden, 8; *Bowles v. Stewart*, 1 Sch. & Lef. 209; yet, says Lord Hardwicke, it is the ordinary relief of the remainder-man to have the title-deeds taken care of against the tenant for life: but this equity does not extend to a remote remainder-man, *Joy v. Joy*, 2 Eq. Ca. Abr. 284, pl. 4; *Ivie v. Ivie*, 1 Atk. 431; *Smith v. Cooke*, 3 *ibid.* 382; *Lempster v. Pomfret*, Amb. 154; *Southby v. Stonehouse*, 2 Ves. 612, though it comprehends the case of a jointress, provided the party confirm her jointure. *Senhouse v. Earl*, 2 Ves. 450. *Leach v. Trollope*, *ibid.* 662. *Petre v. Petre*, 3 Atk. 511. But an heir cannot support a bill for title-deeds, without shewing that they are in some way necessary to enable him to recover at law. His title as heir is what he must rely on; and if he cannot set aside the will, he has nothing to do with the deeds. *Jones v. Jones*, 3 Meriv. 172; et vide *Lady Shaftsbury v. Arrowsmith*, 4 Ves. 66; and *Banbury v. Biscoe*, 2 Ch. Ca. 42.

Lord Bridgman, who had got wrong in the proceedings. It was then heard before Lord Nottingham, who, having set the cause right before the court, said, that upon the true merits thereof, there were only two points which were considerable. 1st. What the law of this court was concerning purchasers. 2dly. Whether the defendant was a purchaser within that law. As to the first point: "A purchaser, *bonâ fide*, without notice of any defect in his title at the time of the purchase made, may lawfully buy in a *statute* or *mortgage*, or any other incumbrance; and if he can defend himself at law by any such incumbrances bought in, his adversary shall never be aided in a court of equity by setting aside such incumbrances; for equity will not disarm a purchaser but assist him; and precedents of this nature are very ancient and numerous (*vis.*) where the court hath refused to give any assistance against a purchaser either to an heir, to a widow, or to the fatherless, or to creditors, or even to one purchaser against another." And his Lordship further observes, "that this rule in a court of equity is agreeable to the wisdom of the common law, where the maxims which refer to descents, discontinuances, non-claims, and to collateral warranties, are only the wise arts and inventions of the law, to protect the possession, and to strengthen the rights of purchasers."

Argument continued.

On the same ground, Lord Keeper North, in the case of *Perratt v. Ballard* (g), refused to compel a purchaser of jewels, &c. from one against whom a commission of bankruptcy afterwards issued, to answer as to the time of the bankruptcy, saying, "it was an infallible rule, that a purchaser, for a valuable consideration without notice, shall never discover ANY THING to hurt himself;" and see *Brown v. Williams*, 2 Ch. Ca. 135; et *Wagstaff v. Read*, *ibid.* S. L. 156. Upon the same ground Sir Nathaniel Wright, Lord Keeper, in the case of *Hall v. Atkinson* (h), refused to oblige a purchaser to produce a lease, which it was said mentioned a trust; his Lordship said it was a side-wind, to make a purchaser produce and expose his title, and he would not do it, unless the plaintiff had

Purchaser without notice never compellable to discover any thing to his prejudice.

(g) *Perratt v. Ballard*, 33 Car. 2. Ch. Ca. 72.

(h) 1 Eq. Ca. Abr. 333, 4. Et vide S. C. ante, [633.—Ed.]

Argument
continued.

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Same of mort-
gagees if he de-
nies notice.

made some proof towards falsifying his answer. And Lord Talbot, speaking of the rules of equity, in the case of *Collet v. Ward* (i), lays down *this* rule in these broad and unequivocal terms. "One of these rules is, that a purchaser for a valuable consideration without notice, *having as good title to equity as any other person, this court will never take any advantage from him, and consequently will not grant a discovery against him, of the only equity he has to defend himself by, which, if he should be obliged to discover, the other party would immediately take advantage of.* And there certainly may be cases where a purchaser, for a valuable consideration, shall not be obliged to discover *any thing* (whether incumbrances that he has got in *or any other thing*), but *all advantages* shall be left to him to defend himself. Suppose two purchasers, without notice, and the second by chance gets hold of an old term, he shall defend himself thereby against the first, *who still is as much a purchaser for a valuable consideration as himself.*" Lord Hardwicke emphatically says, in the case of *Senhouse v.*

Earl (k), "it is a *constant, invariable* rule, that *ANY mortgagee* may protect himself from the discovery of his title-deeds, *if he denies notice.*" "As to a jointress," he says, "it is otherwise, where the plaintiff claims as heir at law to the person who made the jointure, and no appearance of any settlement, the court will, upon the defendant's offer to confirm the jointure, oblige a production of the deed; but, as to a mortgagee, if the plaintiff brings his bill to redeem, *ever so strongly*, he is not entitled to see the mortgagee's title-deeds. Why? because a third person may find out a flaw in them. IT IS A FIRST PRINCIPLE AND NOT TO BE ARGUED, *it depends THEREFORE on the denial of notice.*"

Ownership of
deed concealed,
nothing to do
with right to
call for its dis-
covery.

In this opinion of Lord Hardwicke we see the extent of the *criticism* suggested by Lord Loughborough, in the case under consideration, as to the distinction between cases in which a person shall be permitted to retain property in which he has no beneficial interest, but which may be of advantage to another, and where he shall not. If, in such case, the claim of the holder of the deed be admitted and allowed, the deed

(i) Ca. temp. Talb. 68.

(k) 2 Ves. 450.

shall be produced for the benefit of the party, who has a right to take every advantage of it, *except as against the claim of the party holding it*. But, *unless the claim of the person holding it be allowed*, if that claim be consistent with conscience, that is, *if it be purchased for a valuable consideration without notice*, he shall not be obliged to produce that which may discover a flaw in his title, *though another be the owner of it*. Then, it is apprehended, the actual ownership of the deed concealed has nothing to do with *the right to call for its production against a person claiming as a purchaser without notice*. Such a person has a right to use the advantage he has got either *defensively, or offensively, actively, or privatively*.

Argument continued.

And it seems that a court of equity acts so strenuously in this case, in behalf of such a purchaser, that to rebut this plea *actual notice* must be made out in proof. The court will *not presume any thing* against such a purchaser (1). Therefore, where tenant for life sold as tenant in fee, and the settlement *was produced and delivered to the purchaser himself*, yet the court would not affect the purchaser with presumptive notice, but dismissed the bill.

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No presumption against bona fide purchaser.

But an idea is started in the judgment now under our consideration, that this *plank* can only be made use of as a *shield* to the *actual possession*. And the Chancellor says, it is difficult to imagine a case in which it can be used for *any other purpose* than to *defend the actual possession*. The Attorney-General in arguing this case, suggested in answer to this observation, that in the plea it was not said, it was to maintain the possession. The answer given by the noble Judge was, "that if his Lordship was right, no such statement should be found in any plea; for *ex hypothesi* the defendant was in possession of that which he sought to defend." But this seems to be *petitio principii*. A mere circle. But Lord Nottingham

That plea without notice can only defend actual possession, questioned.

(1) *Philips v. Redhill*, 2 Vern. 160. : *v. Saunders*, *infra*, 647 a, in which the [But the principal point in this case is considered as over-ruled, by *Daniels v. Davison*, 16 Ves. 249, and cases therein cited.—Ed.] Et vide *Jerrard* term being derivative, involved presumptive notice of the settlement by which it was created.

*Argument
continued.*

considering the law on this subject, in the case of *Basset v. Nosworthy*, states two purposes for which this rule was established, in analogy to the common law in its maxims, which refer to descents, discontinuances, non-claims, and collateral warranties, *viz.* to protect the possession, AND TO STRENGTHEN THE RIGHTS OF PURCHASERS (m).

*For any mort-
gagee may pro-
tect himself
from discovery
of deeds, if he
denies notice.*

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No case that I have been able to discover has set any such limits as those suggested by the Chancellor, in this case of *Strode v. Blackburne*, to this plea, founded upon this rule or *first principle*, as it is called by Lord Hardwicke (n). On the contrary, Lord Hardwicke says, *any mortgagee may protect himself from the discovery of his title-deeds, if he denies notice*. Indeed, if any distinction were made in the application of this rule, between a mortgagee in possession, and a mortgagee out of possession, a singular inequity would be the consequence, and that without any reason for it. For then a mortgagee in possession would be protected in his defective title, but a mortgagee out of possession would be defeated; and yet there is no equity in favor of the one, more than in favor of the other; for a mortgagee does not, in the ordinary course of things, take possession; the nature of the contract does not require it; it is contrary to the intention of the parties (o). A mortgagee only takes the legal estate as a security; if it were otherwise, no person would lend his money upon such terms. A mortgagee would say, he would have nothing to do with the management of the estate: it is generally stipulated that the mortgagor shall retain possession till the mortgage is forfeited. The omitting to take possession, therefore, does not expose a mortgagee to the imputation either of fraud or negligence. But a new system must be adopted by mortgagees, if this plea be thus qualified, or they must renounce the benefit of this rule, which equity has established *to strengthen the rights of purchasers*.

(m) Vide ante, 643.

(n) Sir J. Bursell v. Cook, 2 Freem. 24. [cited and acknowledged 2 Ves. jun. 457.—Ed.] *Millard's case*, ibid. 43. *Seymour v. Nosworthy*, ibid. 128. *More v. Mayhew*, ibid. 175. S. C. 1 Ch.

Ca. 34. *Shirley v. Fagg*, ibid. 68. *Meynell v. Garraway*, Nels. Ch. Rep. 63. *Heyman v. Gomeldon*, Finch. 54. *Cantrell v. Mannington*, ibid. 219.

(o) Vide ante, [vol. i. 155.—Ed.]

But it does not rest merely upon the absence of any such allegation in the plea, there are several authorities and cases which in fact decide the point the other way. In the case of *Brampton v. Baker*, in 1671, stated in a former part of this treatise (p), we find the very case in terms. A mortgage by a tenant for life, to one who *actually* had *seen* the deed of settlement, but had been advised that the tenant for life could destroy the contingent remainders, whereas in truth the remainders had vested by the birth of a son a day or two before; but of which the mortgagee had no notice. But the mortgagee having got the deed of settlement, the court would not relieve against a purchaser, but dismissed the bill. And in the case of *Seybourne v. Clifton* (q), where the plaintiff and defendant had each of them purchased a *reversion* expectant on the death of tenant for life (consequently neither of them were in possession), the plaintiff's bill that he might examine his witnesses to preserve their testimony, and might be permitted to try his title in the life-time of the tenant for life, was dismissed; for as the purchaser was a defendant, the court would do nothing in it, and the plaintiff lost his land for want of examining his witnesses (B): et vide *Beckwenall v. Arnold*, 1 Vern. 354. S. L. And Lord Hardwicke, in the case of *Willoughby v. Willoughby* (r), observes, speaking of severing a term to attend the inheritance from the inheritance, "if such a purchaser (that is, a purchaser for a valuable consideration, *bonâ fide*, not affected with any fraud or collusion) has no notice of a prior incumbrance, and takes a defective conveyance of an estate, and an assignment of a term to attend the inheritance, in this case he shall have the benefit of the term to protect his estate. And he may either *defend his possession by it*, or he may *use it to recover his possession at law*, though his adversary has the inheritance, which makes me

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(p) Ante, 581.

(q) Cited by Lord Rawlinson, 2 Vern. 159.

(r) Ante, vol. i. 465.

(B) The bill was unquestionably dismissed, though Nels. Ch. Rep. 125, seems contra. The case was noticed by Lord Eldon, in *Dursley v. Fitzhardinge*, 6 Ves. 263, who read a manuscript note of it, supplied him by Mr. Hollist, from which Lord Eldon said, it appeared that the case amounted to no decision at all.

*Argument
continued.*

(Lord Hardwicke) say, that this court often disannexes the term from the inheritance. This is the meaning when it is said, 'that if a man have law and equity on his side, he shall not be *hurt* here.' "

*Defendant,
stating by an-
swer, purchase
for value with-
out notice, not
compellable to
answer further.*

The last case I shall cite upon this point, is that of *Jerrard v. Saunders* (s). The facts in this case were, that in 1711, J. H. seised in fee, demised to G. for a term of 1000 years, which about the year 1730 being by *mesne* assignments vested in H., subject to a mortgage to B., was purchased by C. J., and by indentures between the mortgagee H., C. J. and his trustees some time in the year 1730, (the more particular date whereof the plaintiff had not been able to discover, as such deed was in the custody of the defendant,) the premises were assigned for the remainder of the term in trust for C. J. *for life*, remainder to T. J. and S. his wife, for the lives of them and the survivor, remainder for all and every the children of their bodies, &c. with divers remainders over. C. J. held till his death in 1749, then T. J. entered and held till his death about fifteen years before. His wife died in his life, and the plaintiff as their only surviving child entered. The defendant, under colour of some mortgage from T. J., had got in his possession the settlement of 1730, and other title-deeds, and had filed a bill of foreclosure *and brought two* ejectments. The bill charged notice of the settlement and its contents on the defendant, and other special circumstances, and prayed that the defendant might answer, and produce the settlement and all other title-deeds, &c. and an injunction from proceeding at law. The defendant pleaded a mortgage without notice actual

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or constructive; which plea had been over-ruled on a former hearing, because the facts from which notice was inferred, were not denied. An answer was then put in, to which a great number of exceptions were taken. The point came before the court, on exceptions to the Master's report upon the exceptions to the answer. Lord Loughborough, Chancellor, after stating that Lord Nottingham had laid it down, "that *against a purchaser for a valuable consideration*, the Court of Chancery had *no jurisdiction*; and that *Fag's case*

was determined by him: That the defendant in that case had picked up from the conveyancer's table the deed that affected his title; and though he got it in that manner, Lord Nottingham would not oblige him to set it forth. Lord Loughborough said, a case that occurred to his recollection produced many points, it was *Basset v. Nosworthy* (t). His Lordship said, the book did not state it amiss, and he cited the passage before-mentioned. His Lordship said, he was *perfectly satisfied* upon the *general* reasoning, that court would *never* extend its jurisdiction *to compel* a purchaser, who had fully and in the most precise terms, denied all the circumstances mentioned, as circumstances from which notice might be inferred, *to go on to make a further answer as to all the circumstances of the case, that were to blot and rip up his title.* To do so would be to act *against the known established principles of that court.* His Lordship thought it had been decided, that against a purchaser for valuable consideration without notice, that court *would not take the least step imaginable.* His Lordship said, he believed it was decided, that you *cannot even have a bill to perpetuate testimony* against him. He was pretty sure, it was determined, that *no advantage* should be taken from him *by that court.* The doctrine as to the jurisdiction of that court was *this:* you cannot *attach* upon the conscience of the party *any demand whatever,* where he stands *as a purchaser having paid his money,* and denies all notice of the circumstances set up by the bill. And his Lordship allowed the exceptions to the report.

Argument continued.

Not least step taken against purchaser for value without notice in equity, not even to perpetuate testimony against him.

The manner also in which this defence is used, shews that possession has nothing to do with it. For the defendant denies notice, which denial of notice must be by way of answer, which answer must meet the allegations of the bill, and the plea is founded on the answer, and alleges seisin and possession, (*not in the purchaser*), but in the person from whom the purchase is made. Therefore if the bill alleges that the defendant had notice *at* or before his taking the conveyance, the answer must deny the fact as stated; *viz.* that the defendant had notice before that time: vide *More v. Mayhew*, 1 Ch. Ca. 34. *S. C.* 2 Freem. 175. *Anon.* 2 Ch. Ca. 161, et *Trevarian v. Mosse*,

Possession irrelevant to plea of purchase without notice.

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(t) Vide ante, 642.

Argument
continued.

1 Vern. 246. Now it appears to me to follow of course, that if, *an instant* after the money paid and conveyance made, the defendant had notice (*i. e.* before he could possibly have actual possession, unless the deeds were executed on the lands, which is rarely the case) the purchaser might the next moment put in this plea to a bill by a prior purchaser to discover title-deeds.

When mortgagee compellable to set out boundaries of estate mortgaged.

The Chancellor, in the principal case, puts two instances to illustrate the grounds upon which his decision is founded. The first, if I understand it, is the case of the mortgage of an estate partly settled and partly unsettled, the boundaries of which had been confounded during the possession of the owner. In such case, his Lordship observes, this plea could not be carried to the extent the defendant supposed. The observation that presents itself on this instance is, that if the mortgagee understood he was taking a mortgage of settled and unsettled estates, his Lordship's conclusion is strictly correct, this plea would not protect the mortgagee from setting out the boundaries. But if the mortgagee had not notice that part of the estate was in settlement, the instance put involves merely the present question on another case similar in its nature, and subject to be decided on the same principles.

Purchaser not obliged to discover to creditor what lands are subject to his judgment.

A case nearly similar occurs in the books, which, in the instance of a purchaser without notice, militates the other way: I allude to the case of *Snelling v. Squib* (v), where A. had a judgment against B. of 1200*l.* for payment of 500*l.* C. purchased of B. for a valuable consideration without notice. A. sued C. to discover lands subject, &c. that he might extend them, not knowing the place nor who were the tenants. C. pleaded his purchase for a valuable consideration without notice. The Lord Chancellor allowed the plea; for such purchaser should not be hurt in Chancery against the plea, and therefore C. should not be obliged to discover what lands were liable. And the reporter says, "It was much debated and objected that a judgment binds the land whoever had it." And the plaintiff's bill was not to have a decree for his debt, or to

(v) *Snelling v. Squib*, 32 & 33 Car. 2. 2 Ch. Ca. 47.

have the land, but to discover the same whereby at law he might recover his debt.

Argument
continued.

The second case put by Lord Loughborough is an instance of personal chattels pledged by a person, not the owner, but who had a qualified interest therein. This case is distinguishable from the principal case, in as much as value paid gives no title to such property, unless it be transferred in market overt; consequently, unless the transfer be made in market overt, the holder is no purchaser. But if the purchase was regularly made, the case of *Abery v. Williams* (u), seems to warrant a contrary conclusion upon the facts stated, than that which is drawn from similar ones in the judgment in *Strode v. Blackburn*. In the case to which allusion is now made, the bill set forth, that A. being indebted to the plaintiffs and others, a commission of bankruptcy issued against him the 16th of November, 1780, and that several suits of tapestry of his were in the defendant's hands, which the commissioners had assigned to the plaintiffs for the benefit of his creditors, and that they ought to have an account thereof; but that the defendant pretended they were pawned or sold to him by the bankrupt without any trust; whereas it was on a trust, and done to conceal them, and so prayed a discovery and relief. The defendant pleaded that neither he nor any in trust for him had, nor ever had, any goods belonging to the bankrupt, but what the defendant bought *bonâ fide* for a full value in money really paid by the defendant to the bankrupt, or his order, before any commission was sued out against him, and before the defendant had any notice that he was a bankrupt, or had done any act of bankruptcy, and without any in trust or condition, other than that the defendant by parol did declare, that if the bankrupt paid the money paid him by the defendant, and interest for the same, at the time agreed on, and then past, that then the defendant would re-deliver the goods to him; and averred that the bankrupt failed to pay the money, or any part of it,

One buying goods of bankrupt between act and commission sued, not obliged to discover what goods he really bought, if at time he had no notice of bankruptcy.

(u) 1 Vern. 27. [and if two months have elapsed since the purchase, and no commission issued, the purchaser will be safe under Sir Samuel Ro-

milly's act, 46 Geo. 3. c. 135, considered more at large in a former note, see ante, 594, note (R).—Ed.]

*Argument
continued.*

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at the time agreed on. And that the bankrupt, two years since, agreed that the same should be sold by J. S., and that by the money so to be raised, the defendant should be paid his money with interest, and the surplus to the bankrupt; and averred that the money raised by sale was 200*l.* short of what the bankrupt owed him, and which 200*l.* was still due. And that the 19th of October, 1680, the defendant gave the bankrupt a general release to that time; and that the defendant had no dealings with him since. And the defendant further pleaded, that he had been examined by the commissioners, as far as by law he was obliged; and insisted, that being a purchaser so as aforesaid, he ought not be put to answer, to subject himself to an action, which the bill aimed at, by pressing a discovery of what goods of the bankrupt came to the defendant's hands. The Lord Chancellor allowed the plea, and said the law was hard against tradesmen that dealt with bankrupts before notice; and the assignees *ought not* to be assisted in *equity* in any such case.

*But on sugges-
tion of pur-
chase at under
value, discovery
ordered on
terms.*

And in the case of *Wagstaff v. Read* (x), which arose on a bill for a discovery against one who had purchased goods of another, against whom a commission of bankruptcy had afterwards issued, and who was said to *have purchased them under their value*. The Lord Keeper inclined to make the defendant discover what goods he had had, and at what price. But the defendant's counsel objecting that this would destroy and prejudice the purchaser, though he paid the full value; for if he discovered what he paid, the commissioners would assign the money, *and so the court should be instrumental to wound the purchaser*. If the plaintiff could help himself at law, by the aid of the statute of bankrupts, he might, and the court would not hinder him, *but not aid him there*. The Lord Keeper ordered, that the defendant should answer what and how much he paid, so as the plaintiff did consent to take no advantage of the discovery, but in that court and not at law, which the plaintiff consented to by his counsel, and was to subscribe his consent with the register, and then the defendant was to answer.

(x) 2 Ch. Ca. 156.

So (y), where a bill was to discover whether a lease made in Queen Elizabeth's time for ninety-nine years, in trust for Dr. L., to commence after the estates then in being were determined, was not effluxed in point of time, and charged, it would so appear by deeds and writings in the hands of the defendant, the assignee of the lease, and that he knew the lease was expired, but refused to discover. The defendant pleaded the lease, and that he was informed, that in *seventy-seven*, when he purchased, there were *fifty-seven* years to come in the lease and therefore gave after nineteen years purchase for it, and *consequently* ought not to make any discovery to *impair or weaken his title*. And the plea was allowed, and a demurrer also.

Plea of purchase for value, without notice. Discovery not granted.

I have now gone through the argument, and, with great deference to its illustrious author, I cannot but submit it as my opinion, that from the authorities extant upon the subject, it appears that the law is to be found in the judgment on the case of *Jerrard v. Saunders*, and not in that of *Strode v. Blackburn* (c).

Argument against Strode v. Blackburn concluded.
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(y) *Bishop of Worcester v. Parker*, 2 Vern. 255.

(C) The learned author's conclusion has since been fully confirmed by the present Lord Chancellor, in the case of *Walwyn v. Lee*, 9 Ves. 24, which was in circumstances precisely similar to that of *Strode v. Blackburn*. A tenant for life, alleging himself to be seised in fee, and being in actual possession of the premises and of the title-deeds relating thereto, as apparent owner thereof, executed the several mortgages under which the defendant Lee claimed, and delivered to the mortgagees the title-deeds appertaining to the premises, which were then in the possession of the defendant (who was an assignee of the mortgages). The tenant for life dying, his son, who was tenant in tail expectant on his father's decease, under his father's marriage settlement, took possession of the estate, and filed a bill for discovery and delivery of the title-deeds. To which the defendant pleaded that he was a purchaser for valuable consideration without notice of the settlement; and contended, that previously to the case of *Strode v. Blackburn*, the circumstance of possession was never considered as making any difference as to the right of the purchaser, and could not be the criterion; for where was the distinction between a purchaser in possession, and one, who by the deeds in his custody, had the means of obtaining possession? In general, a mortgagee did not take possession; nor was that the object according to the nature of his contract. It could not therefore be necessary to give him the protection of a purchaser. All the authorities, except *Strode v. Blackburn*, were in favor of the defendant; uniformly holding, that against a purchaser for va-

Author's doubts well founded.

Mortgagee bound by notice of subsequent mortgage.

Where a mortgagee (z), after notice of a subsequent mortgage, joined with the mortgagor in sale of the lands to a

(z) *Bentham v. Haincourt*, Pre. Ch. 30.

valuable consideration without notice, there was no jurisdiction. [This proposition, however, has never been fully acknowledged.] There was no claim upon his conscience. Lord Rosslyn himself, in *Jerrard v. Saunders*, would not take the distinction upon the possession for the first time attempted in *Strode v. Blackburn*; and it was conceded, on the part of the plaintiffs, that certainly it was immaterial whether the purchaser were in or out of possession: but it must appear upon the record that he was entitled to the possession; whether he was in possession, or had deeds that would entitle him to the possession, was immaterial: but in all those cases the purchaser had a right to take the possession. If the defendant could state that there was an outstanding term, certainly he might protect himself; for by that he could get possession. But, as the case stood, he neither had the possession nor the means of procuring it. Would the court then permit him to keep the deeds for the single purpose of extortion?

Supported by Lord Eldon.

The Lord Chancellor said he could not help entertaining doubt whether the decision, which was brought in question upon this plea [namely, that of *Strode v. Blackburn*], stood upon right principles. It was impossible, if that case were right, that a mortgage could be taken without taking possession. It was assuming the question to suppose, that all those deeds could be of no value or consequence to the defendant [*Blackburn*]. There was the obvious instance, that there might be an old satisfied term; an assignment of which the defendant might procure, and maintain an ejectment. Certainly it was not like the case of a claim to hold the deeds as mere chattels. They were held as matter of title. As the case of the box of jewels was put,—Lord Eldon had difficulty in assenting to it; for it was assuming the question. It was very unlike the case of a carrier or bailee, who have no power of disposal; that is, to do what they please with the subject. The passage towards the end of the judgment [in the case of *Strode v. Blackburn*], as to a satisfied term, was inconsistent with the established doctrine,—that if a purchaser can get in a satisfied term, he may make use of it; and this court will not prevent him. It probably alluded to the doctrine of courts of law then got rid of, as to satisfied terms; which certainly went to shake all titles. [This, perhaps was in allusion to his Lordship's doubt in *Evans v. Bicknell*, 6 Ves. 184; but it is questionable whether that doubt is well founded, see ante, vol. i. 498, *in notis*.]

[653*]

Plea should aver that vendor or mortgagor was owner, or pretended owner, and that he was in possession,—not that purchaser was.

The importance of this question, continued Lord Eldon, was very great; in the case before him the mortgagor was in possession of the estate; which was *primâ facie* evidence, that he was owner of the fee-simple. He was in possession of documents, which would prove him to be tenant in fee. The mortgagee, who without doubt was a purchaser for valuable consideration, stood in circumstances, that enabled the defendant Lee to aver every proposition necessary to the plea, of a purchase for valuable consideration without notice, seeking to shut out the discovery: viz. that the vendor or mortgagor was

stranger, it was resolved, that the money received by either,

the owner or pretended owner; and (which Lord Eldon conceived must be averred,) that the mortgagor was in possession. It was never held necessary to aver in the plea that the purchaser was put in possession. Lord Eldon knew of no such case. Lord Rosslyn upon that said, it should not be averred; for *ex hypothesi*, the plea presumed it. Lord Eldon doubted that; for what was necessary to the plea of purchase for valuable consideration, as in the case of every other plea, must be averred; and it would go this length, that it was not necessary to aver, that the vendor was in possession; for if the plea would not do, unless he were in possession, the same doctrine would equally authorise the omission of the fact, that the purchaser took possession, if it was necessary that he should do so. With respect to this particular species of purchaser, a mortgagee, it was also to be remembered, that the possession did not in the nature of the thing ordinarily accompany the transaction; and the fact that the mortgagor remained in the possession, in one sense did not amount to an assertion, that the mortgagee was out of possession; and it was admitted, that during the life of the mortgagor, while the mortgagee had the legal as well as the equitable right, the mortgagee was to be considered in possession. And if in any case the mortgagee is to be taken as out of possession, that might be occasioned not by any species of negligence, in not taking actual possession originally according to his title, but by the defect arising out of the nature of the title he had the misfortune to take. It was of necessity then, that this court should hold as against a purchaser for valuable consideration without notice, that if the possession of the estate has been got from him, the possession of the deeds shall be taken out of his hands by this court, and thrown in to the person, who has got from him the possession of the estate? And was it not worth consideration, whether the very principle of this plea were not this: "I have honestly and *bonâ fide* paid for the estate, in order to make myself the owner of it; and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril, in which you state I have placed myself in the article of purchasing *bonâ fide*." Lord Eldon concluded by saying, that he felt the case to be of great importance, with reference to the transactions of the world, (especially if he should be compelled to infringe upon an authority, to which he looked with great respect, but which at that moment he could not think consistent with the doctrine of the court, as to a purchaser for valuable consideration without notice,) and therefore he thought he should be obliged to take further time to consider, which his Lordship took accordingly.

The plea having stood a considerable time for judgment, was allowed. Thus placing it beyond doubt, that in a plea of purchase for valuable consideration without notice, it is not necessary that the plea should aver that the purchaser was put in possession. But the plea should aver that the vendor was seised in fee or pretended to be so seised, and that he was in possession (if the conveyance purport to be an immediate transfer of the possession,) at the time when the vendor executed the purchase-deed. *Trevelyan v. Mosse*, 1 Vern. 246. *Storey v. Windsor*, 2 Atk. 630. *Head v. Egerton*, 3 P. Wms. 281. *Walwyn v. Lee*, 9 Ves. 32. *Attorney-General v. Buckhouse*, 17 ibid. 291, and *Redea. Tr. Pl.* 215, 2d ed. And this possession will be satisfied by the posses-

Plea of purchase for valuable consideration without notice, must aver possession in vendor, conveyance, and consideration, and deny notice and fraud.

for the purchase, should sink so much of the mortgage money.

sion of the vendor's tenant. *Daniels v. Davison*, 16 Ves. 252; *S. C.* 17 *ibid.* 433. Where the purchase is of a reversionary estate, of which the possession cannot consequently be immediately had, the plea must set out how the person from whom the title is deduced became entitled. *Hughes v. Garth*, 2 Eden, 168; *S. C. Amb.* 421. And the plea must aver an actual conveyance, and not mere articles or an agreement to convey, *Bradlyn v. Ord*, 1 Atk. 571; *Fitzgerald v. Fauconbridge*, Fitzgib. 207; *Hart v. Middlehurst*, 5 Atk. 371; *Head v. Egerton*, 3 P.W. 281; and *Beatniff v. Smith*, 1 Eq. Ca. Abr. 357, pl. 11; and as a mere volunteer is not clothed with the character of a purchaser and cannot protect himself by a plea of this kind, (see 2 Atk. 241) it is also necessary that the plea should aver the consideration and actual payment of it. In one instance, a plea averring that the money was paid, or was *bona fide* secured to be paid, was over-ruled, *Hardingham v. Nicholls*, 3 Atk. 304; and in another, a plea averring that the purchase-money was paid and secured, but not setting forth the amount of the purchase-money nor to whom paid, was over-ruled, *Cautrell v. Mannington*, Finch, 219. So we have seen the plea of purchase for valuable consideration, must deny notice of the plaintiff's title or claim, (*Anon.* 2 Vent. 364, 2d case), previous to the execution of the deeds and payment of the money, *More v. Mayhew*, 1 Ch. Ca. 54; *Harwood v. Tooke*, MS. 2 Madd. Ch. 323, otherwise it will not be a complete equitable bar; for if a person had notice of the title though he paid value for it he would not be, in the language of C. B. Gilbert, "*a conscionable purchaser*," et vide *Harrison v. Southcote*, 1 Atk. 538. *Storey v. Windsor*, 2 *ibid.* 630. *Townsend v. Ash*, 3 *ibid.* 237, 238. *S. C.* 3 P. Wms. 307. *Saunders v. Dehew*, 2 Vern. 271. *Blades v. Blades*, 1 Eq. Ca. Abr. 358. *Mansell v. Mansell*, 2 P. Wms. 681. *S. C. Ca. temp. Talb.* 260. Fraud must also be denied generally by way of averment in the plea, otherwise the fact of notice or of fraud would not be put in issue, and the plea would not in itself constitute a complete bar. *Harris v. Ingledew*, 3 P. Wms. 91. *Redes. Tr. on Plead.* 195, 3d edit. *Coop. on Plead.* 283. But if notice or fraud thus put in issue be proved by the plaintiff, it will effectually open the plea on the hearing of the cause, though where the evidence of notice is loose, the court will not, it seems, act upon it. 2 Ball & Bea. 301. Thus the recital in a deed of a fact, which may or may not, according to circumstances, be held in a court of equity to amount to a fraud, will not, it seems, affect a purchaser for valuable consideration denying actual notice of fraud. *Kenny v. Brown*, 3 Ridgw. P. C. 512, and see 17 Ves. 293. If, however, the plaintiff reply to a plea which has omitted to deny notice, that will cure the defect; 3 P. Wms. 94, 5. 2 Ball & Bea. 202, et vide ante, vol. i. 553, note (U). And it is observable, that if particular instances of notice or circumstances of fraud are charged, the facts from which they are inferred, must also be denied as specially and particularly as charged. *Medir v. Birt*, Gilb. Eq. Ca. 185. *Radford v. Wilson*, 3 Atk. 815; and see *Jerrard v. Saunders*, 2 Ves. jun. 187. *S. C.* 4 Bro. C. C. 322. A plea of the statute of 32 Hen. 8. c. 9. s. 3, against buying and selling pretended titles, and also that there was not any mortgage as mentioned in the bill, to a bill that the defendant might redeem a mortgage upon a covenant

A purchaser for a valuable consideration shall hold (a); or take place against a prior voluntary settlement, though he

Voluntary settlement not binding on purchaser, even with notice.

(c) *Tonkins v. Ennis*, 1 Eq. Ca. Abr. [683. *Saunders v. Dehew*, 2 Vern. 384, pl. 6. Cowp. 280. 711. *Gardiner v. Painter*, Sel. Ch. Ca. 65. infra.] 272.—Ed.]

in a lease from the defendant to the plaintiff, has been held good, though a negative plea. *Hitchens v. Lander*, Coop. Rep. 34.

Mortgagees, lessees, and persons taking under a marriage settlement, are purchasers to whom the plea under consideration is available. *Wulcyn v. Lee*, 9 Ves. 32. *Banbury v. Biscoe*, 2 Ch. Ca. 42. *Ashton v. Bretland*, 9 Mod. 59. 17 Ves. 293. *Matthews v. Jones*, 2 Anstr. 506, et vide 2 Sch. & Lef. 147. Finch, 9. 8 Bro. P. C. 291. Toml. ed. Pre. in Ch. 591. A purchaser is defined, by the editor of the first volume of the Abridgment of Cases in Equity, to be "a person, who innocently, without fraud or surprise, for valuable consideration, acquires a right or interest" p. 353; and Lord C. Mannors observes, "I have always thought, that he who has the best right to call for the legal estate, is entitled to this defence." *Medlicott v. O'Donnell*, 1 Ball & Bea. 171. But this must be understood as spoken of the best right in *foro conscientie*, as every plea of this kind appears to admit, that the defendant has no legal title, per Lord Eldon, 9 Ves. 33, 4. And it should be observed, that though a purchaser for valuable consideration without notice, is highly favored in equity, yet, in some cases, the court will assist against him if it be in furtherance of justice. *Dursley v. Fitzhardinge*, 6 Ves. 251. Mitf. Tr. on Pl. (3d edit.) 226. Coop. on Plead. 288. Beames's Elem. Pleas, 243. Notice may be denied by either plea or answer, *Coke v. Wilcocks*, Mose. 73. If denied by answer, all difficulties in respect of the plea will be avoided. And it is observable, that the general proposition, that if a defendant answer, he must answer fully, has, for one of its excepted cases, that of a purchaser for valuable consideration without notice. *Stephens v. Gaule*, 2 Vern. 701. *Jerrard v. Saunders*, 2 Ves. jun. 454. 15 ibid. 378. *Leonard v. Leonard*, 1 Ball & Bea. 325. 2 ibid. 303. Indeed, Lord North has ruled, that the plea of being a purchaser without notice is a bad plea; that denial of notice can be taken advantage of by way of answer only, *Anon.* 2 Ch. Ca. 161. But the contrary was held before Lord North's time, in *Ashcombe's case*, 1 ibid. 232, and it is now clear, that notice may be denied by either plea or answer. A general allegation in the answer, that the defendant could not be affected by notice in any way, is not a sufficient intimation to the plaintiff, that the defendant intends to rely upon the insufficiency of the notice. *Bennett v. Neale*, Wightw. Rep. 324, (*Tithe Cause*). It is also observable, that if a bill be dismissed after hearing, another bill may be filed suggesting notice, provided notice was in issue in the former cause, but not proved on the one side nor denied on the other. *Williams v. Williams*, 1 Ch. Ca. 252.

Purchaser, what and who.

Of avoiding plea by answer. [655 *]

It has been said, that this plea is purely an equitable plea, and a bar to an equitable claim only. *Williams v. Lambe*, 3 Bro. C. C. 264, cited 1 Ball & Bea. 171, and *Rogers v. Seal*, 2 Freem. 84. But in *Burlace v. Cook*, 2 Freem. 24, Lord Nottingham held the plea to be good against a legal estate; and in

Plea protects as well against legal as equitable claim.

hath express notice thereof at the time of his purchase; such voluntary settlement being made void against a purchaser, with or without notice, by the 27th Eliz. c. 4. Therefore, if a man make a voluntary deed, and then a mortgage of the same lands, the first deed is fraudulent, as against the mortgagee (D).

Parker v. Blythmore, 2 Eq. Ca. Abr. 79, pl. 1, the Master of the Rolls was of the same opinion. Considering the case on principle, no well-founded reason can be adduced, why the plea should not protect against a legal as well as an equitable claim. Mr. Fonblanque, in his *Trea. on Eq. lib. 2. c. 6. s. 2*, observes, that this plea may be insisted upon, not only where the party has the prior legal estate, but also where he has a better right or title to call for it; and in *Wilks v. Bodington*, 2 Vern. 599, the same point seems to have been so decided.

Voluntary settlement void against purchaser without notice.

(D) As against subsequent purchasers for valuable consideration without notice; there has never been a doubt, but that voluntary settlements, if fraudulent, are completely void. Such indeed was the doctrine of the common law: and nothing can be clearer, than that a case so circumstanced, comes fully within the act of 27 Eliz. cap. 4. In *Senhouse v. Earl*, Lord Hardwicke held a voluntary settlement to be void against a purchaser *with* notice; and in *Evelyn v. Templer*, 2 Bro. C. C. 148, Lord Thurlow did the same. So in *Chapman v. Emery*, Cowp. 278, Lord Mansfield held, that the 27th Eliz. made voluntary settlements void, as against purchasers with or without notice.

Reasons for considering it good against a purchaser with notice.

But on the other hand, it has been constantly the subject of doubt, whether a purchaser for value with actual notice of the voluntary settlement, will be safe as against such settlement? that is, whether the voluntary settlement shall be *good* (as in the former case it would be *void*) against such purchaser? Mr. Fonblanque observes (1 Fonb. 280, 5th edit.) that "the terms of the second section of the 27th Eliz. c. 4, seem to be sufficiently distinct to confine its operation to such conveyances, as are made with an intent to defraud and deceive subsequent purchasers; but it were difficult to maintain, that a conveyance was made with an intent to defraud a person who, before he became a purchaser, has full notice of such conveyance, see *White v. Stringer*, 2 Lev. 105, and if the terms of the act do not compel a construction in favor of a purchaser, with notice of a voluntary conveyance, the policy and spirit of the act appear to reject such construction. The policy of the act was to prevent fraud; the construction most favorable to such purpose is, that which excludes all temptation to the practice of it; a voluntary deed is binding on the party, and all claiming under him (as subsequent volunteers, for instance, see 22 Vin. Abr. 16, et seq.) and to allow him to defeat his bounty in favor of a purchaser for valuable consideration *without* notice, is merely to prefer a higher consideration; but to allow a purchaser *with* notice, to supersede the claims of a volunteer, seems to encourage a breach of that respect which is morally due to the fair claims and interests of others: it may render the provision of a statute, intended by the legislature to be preventive of fraud, the most effectual instrument of accomplishing it." Cases too are not wanting to confirm Mr. Fonblanque in this construction of the act. Thus, in an anonymous

A conveyance in trust for payment of debts generally, to

Conveyance voluntary, if to pay debts generally.

case, in 1 Eq. Ca. Abr. 354, pl. 4, it was said, that a voluntary settlement would be good against a purchaser with notice, though not against one without, and in *Doe v. Routledge*, Cowp. 712, Lord Mansfield observed—"but with respect to voluntary family settlements to be sure, notice varies it much." And in a late case (*Doe v. Martyr*, 1 New Rep. 335.) Sir James Mansfield, C. J. C. P. said, he regretted that it had ever been decided, as it was in *Evelyn v. Templer*, that even notice of the prior settlement would not defeat such a purchase. And, lastly, it was expressly determined in *Biscoe v. Banbury*, 1 Ch. Ca. 297. 282, that a voluntary settlement will bind a purchaser, who has merely constructive notice of it.

Notwithstanding the authority of these cases, the judges of the court of King's Bench have, in a recent case held, after a minute investigation of the subject, that a voluntary settlement is void against a purchaser *with notice*; for that the statute makes the voluntary conveyance constructively fraudulent; and the purchaser, buying with notice of a fraud, is not, by means of the notice, converted into a trustee, *Doe v. Manning*, 9 East, 59, et vide S. L. *Powell v. Pleydall*, 1 Bro. P. C. 124. Toml. edit. Lord Ellenborough, however, in delivering the unanimous judgment of the court, could not but say as then advised, and considering the construction put on the statute, that it would have been better if the statute had avoided conveyances only against purchasers for a valuable consideration, without notice of the prior conveyance, 9 East, 71. In a still later case, the rule that a voluntary settlement is void against a purchaser with notice, was confirmed by the Court of Common Pleas, in *Hill v. Bishop of Exeter*, 2 Taunt. 69. 77, citing and agreeing with the case of *Doe v. Manning*. But these cases were decided at law, and it might be thought, that a court of equity would relieve against the hardship of the rule, as settled in the King's Bench and Common Pleas, but a case in equity has determined that a voluntary settlement, though free from actual fraud and meritorious as a provision for relations, is void against a subsequent purchaser for valuable consideration *with notice*, and whether the voluntary settlement be by conveyance or articles, in either case specific performance will be decreed against a purchaser, for that notice of the contents of a voluntary settlement has no effect even in equity; therefore notice of a covenant in a voluntary settlement, that the purchase-money should be paid to trustees, to be laid out in other lands to be settled to the same uses was held immaterial, and it was distinctly decided, that there was no equity under a voluntary settlement to prevent a sale, *Buckle v. Mitchell*, 18 Ves. 100. But a person who has made a voluntary settlement cannot, it should seem, maintain a bill for specific performance, which is to defeat that settlement. And it has been held, that a purchaser will have in equity the same rights as at law, under the statute (27 Eliz. c. 4), and a voluntary settlement as against him cannot stand; but the party who made the settlement has no right to disturb it; as against himself it is valid and binding. When he seeks to get rid of it, the court will not impede him, but it will not assist him, *Smith v. Garland*, 2 Meriv. 123, and see *Pulvertoft v. Pulvertoft*, 11 Ves. 84, for the same law. We may therefore, now consider the doctrine of the text as settled on a permanent

But now decided that voluntary settlement is void against purchaser even with notice.

which no creditors are parties, is a voluntary conveyance;

Voluntary settlement, what shall be.

footing; as also, that a voluntary conveyance as such, is constructively fraudulent and void against subsequent purchasers; and, that therefore to enable a purchaser without notice to defeat a voluntary settlement of lands, he has nothing more to do than to shew that it is voluntary.

As to what shall be deemed a voluntary settlement, it may be laid down as a general rule, that every voluntary conveyance by a man for his own benefit is fraudulent against creditors. *Fitzer v. Fitzer*, 2 Atk. 513, and cited in 2 Ves. 17; and see 1 Cox, 446. But a voluntary conveyance of real estate, or a chattel interest in favor of a child, by one not indebted at the time, though he afterwards becomes indebted, will be good against future creditors, though not against purchasers, see *Russell v. Hammond*, 1 Atk. 15, 16. *Holloway v. Millard*, 1 Madd. Rep. 414. *Battersbee v. Farrington*, 1 Swanst. 106, provided there be no particular evidence, or badge of fraud—a power of revocation for instance, *Peacock v. Monk*, 1 Ves. 132, or retention of possession, *Bates v. Graves*, 2 Ves. jun. 293; and see *Stileman v. Ashdown*, 3 Atk. 481, and *Lord Banbury's case*, 2 Freem. 8. And as to marriage settlements, if a settlement be made after marriage, it will, as a general rule, be fraudulent and void against all persons who were creditors of the husband at the time the settlement was made, *Middlecomb v. Marlow*, 2 Atk. 520. *White v. Sanson*, 3 ibid. 413. *Watts v. Thomas*, 2 P. Wms. 364, and *Kidney v. Coussmaker*, 12 Ves. 155, unless such settlement contain a provision for debts. *George v. Milbanke*, 9 ibid. 190; or is made in pursuance of articles before marriage, *Beaumont v. Thorpe*, 1 ibid. 127; or unless it be against a single debt, *Lush v. Wilkinson*, 5 ibid. 387; or the debt be secured by mortgage, in which case it would not affect the settlement, *Stephens v. Olive*, 2 Bro. C. C. 90; for to do that it seems the party must have been insolvent at the time, *Lush v. Wilkinson*, ubi supra; and see *East India Company v. Clavel*, Gilb. Eq. Ca. 37; but it is observable, that if (with the exceptions alluded to) there are creditors at the time of such settlement, and the settlement is on that account declared fraudulent, the property so settled will become part of the husband's assets, and all subsequent creditors will be let in to partake of it. See *Taylor v. Jones*, 2 Atk. 600. A voluntary deed never parted with, and executed for a purpose that has never been completed, is considered in equity as an imperfect instrument. *Cecil v. Butcher*, 2 Jac. & Walk. 573.

Voluntary settlement with power of revocation, is in nature of will.

But see further as to what shall be deemed a voluntary settlement, *Atherley's Trea. on Sett. Ch. xiii. Trea. Eq. lib. 1. c. 1. s. 12. 1 Madd. Ch. 271. Sug. Trea. V. & P. Ch. xvi. s. 1. Ante, vol. i. 220, note (O), adding, to this latter note, Johnson v. Lingard, noticed in Sug. V. & P. 561, stated more at large ib. 570, 5th edit.; et vide Pulvertoft v. Pulvertoft, 18 Ves. 92; see also post, 683, 974, and 1034; and note, a voluntary settlement will be good against the settlor, his heir at law, and a volunteer, provided no power of revocation be introduced in the deed. If such power be inserted, it will then become a testamentary writing, if the settlor takes an estate for life under the settlement; and the volunteer, if the settlement respect personal property, will be subject to the legacy duty on the amount of the benefit he derives from this testamentary writing. See *Attorney-General v. Jones*, 3 Price, 379.*

consequently void against a purchaser for a valuable consideration with or without notice (b) (E).

So, if a man make a conveyance to another in trust, to pay all his debts *mentioned in a schedule*, and all his other debts: as to all the debts not mentioned in the schedule, it is voluntary (c) (F). So, if debts are not specified, as to those debts. [658]

(b) *Langton v. Ashley*, Nels. Eq. Rep. 126. *Leech v. Leech*, 1 Ch. Ca. 249.

(c) *Ibid*.

(E) So if a man convey land for the payment of his debts generally, and retains possession of the conveyance, it is considered as fraudulent and void. *Tarback v. Marbury*, 2 Vern. 510. But in a case where A. brought an action against B. for adultery with his wife, and thereupon B. assigned his estate to trustees, in trust to pay debts mentioned in a schedule, and such other debts as he should name within ten days, and afterwards A. recovered 5000*l.* damages, and filed a bill to set aside the deed, it was held not to be fraudulent; A. being no creditor at the time the deed was executed, and his debt which was recovered after the execution of the deed being founded in *maleficio*. *Leukner v. Freeman*, Prec. in Ch. 105. When conveyance to pay debts is voluntary and void.

(F) But if the creditors, whose debts are unscheduled, acquiesce in the conveyance, it will be good, *Balfour v. Welland*, 16 Ves. 151, ante, vol. i. 239, note (T); nevertheless the deed is in itself an act of bankruptcy. *Goodwyn v. Lightbody*, 1 Dan. 153. [658 *]

A conveyance to pay debts may be, 1st, a conveyance of all the debtor's property, in trust to pay all his debts; 2d, a conveyance of part of his property, in trust for his creditors generally; 3d, a conveyance of all or part of his property, in trust for a few or a portion only of his creditors; and, 4th, a conveyance of part of his property, in trust to pay a particular set of scheduled creditors. The whole of these conveyances are voluntary and void, excepting so far as all the creditors combine to make them good. In a recent case (*Spottiswoode v. Stockdale*, Coop. 105), Lord Eldon took it to be quite clear, that if creditors are to execute a deed of assignment by a *time stated therein*, and it is provided by the deed, that in case they do not do so, that the deed shall be null and void; in case they do not execute the deed within that time, the deed is void at law. But his Lordship stated it to be the constant course in equity, that if creditors act under such a deed, and thereby treat it as valid, although they have not executed it, a court of equity will also act under it, and treat it as valid, whether such creditors have signed it or not; and the bill in the case in question expressly stated, that such creditors as were not included in the schedule, having been requested to become parties to the deed, had in consequence of such application, executed the same accordingly;—which shews that Lord Eldon's observations in this case were confined to instances where all the creditors come in under the deed of composition. But, it is observable, that when only a partial set of creditors come in, the deed may be avoided by the residue. As to those, however, who

Composition deed good, if all creditors execute.

Voluntary mortgage made good by subse-

But although a conveyance be at first fraudulent, the fraud

Creditor not obliged to accede to composition deed.

do execute the deed, the deed will be good, if not avoided by any of the other creditors suing out a commission of bankrupt within two months after the conveyance executed. See ante, 591, *in notis*.

In *Atherton v. Worth*, 1 Dick. 375, a debtor, by deeds of lease and release, conveyed his estates to trustees, in trust to sell for payment of his debts generally, should the creditors come in and accept the composition thereby made. The plaintiffs and many others signed the deed, and agreed to accept the composition. Others refused, and, in consequence of such refusal, the trustees declined executing the trust. Whereupon a bill was brought to establish the said deeds, to have the trust estates sold, and the money applied in discharge of the creditors coming in under the deed, subject to two mortgages, then vested in the representatives of one Crewys, Sir T. Clarke, M. R. (who in the course of the arguments frequently called on the plaintiff's counsel to produce an instance of such a suit) observed, "The debtor, by the conveyance, meant to do justice to all his creditors in general, and not to be partial. But to carry the trust of the deed into execution, for the benefit of those who have signed it, by selling the estates, and applying the money arising from the sale, as prayed, would be acting contrary to what the deed speaks, and certainly was not intended. If a debtor convey an estate to trustees for payment of his debts, and to divide the trust money amongst the creditors in proportion to their debts, it is not obligatory on the creditors to come in and accede to it; neither will it prevent a creditor, who does not choose to come in, from taking a legal course, or such as he shall be advised for payment of his debt. The court hath no power to prevent him: were I to entertain the suit, and direct an execution of the trusts as prayed, it would in effect be doing so; nay, it would be better to do so; for, after having proceeded at law and obtained judgment, there would be nothing to execute it upon but the body of the debtor. The meaning of the conveyance, as I before observed, was for the benefit of all the creditors, or none. After a week in hearing, I see no cause to alter my opinion; therefore let the bill be dismissed."

He may pursue his legal remedy notwithstanding.

Bill may be filed to make creditors come in or renounce. Semb.

[659*]

Assignment of personal property for benefit of all creditors, good, if trustees take immediate possession.

But though a deed of composition will not be valid against creditors holding out, yet it seems a bill may be exhibited by those creditors who come in under the trust deed against those who stand out, to come in or renounce the benefit of the trust. *Dunch v. Kent*, 1 Vern. 260. And as a general rule, it may be laid down, that courts of equity will assist in enforcing agreements for a composition, if obtained without fraud or misrepresentation. *Pollend v. Husband*, 1 P. Wms. 751. *Cann v. Cann*, *ibid*. 727.

In reference to personal property it has been decided, that if pending a suit by one creditor for his demand, and before execution sued, the debtor assigns over all his effects to trustees for the benefit of all his creditors, under which deed possession is taken immediately upon its execution, such assignment will not be deemed fraudulent within the statute 15 Eliz. c. 5, although made with intent to delay the plaintiff of his execution, and although the deed be not signed by any of the creditors. *Rickstock v. Lyster*, 3 Maul. & Selw. 371. In this case Bayley, J. observed, "It seems to me that this

will be purged, if it be afterwards conveyed over upon va-
quent assign-
ment for value.

conveyance, so far from being fraudulent, was the most honest act the party could do. He felt that he had not sufficient to satisfy all his debts, and he proposed to distribute his property in liquidation of them. This was not acceded to; for the plaintiff endeavoured by legal process to obtain his whole debt: the obtaining of which would have swept away the property from the rest of the creditors. The debtor, when he executed, was not for the first time adopting a new notion; it had been in contemplation some months before. And this creditor is not excluded by the deed, but will stand, to all intents and purposes, in the same situation with all the rest of the creditors."

If the debtor be subject to the bankrupt laws, that is, if he be a trader, an assignment of his estate and effects for the benefit of his creditors by deed, executed without the assent of his creditors themselves, will constitute an act of bankruptcy; the reason being, that a trader has not a right by deed to place his property under a distribution different from that ordained by the bankrupt laws. *Rust v. Cooper*, Cowp. 629. *Bourne, Ex parte*, 16 Ves. 148. Cooke's B. L. 5th edit. p. 89. And though there be a provision in an assignment of the whole, or nearly the whole of a trader's estate and effects, that the deed is to be void if a commission of bankruptcy shall be taken out, or if all the creditors, whose debts amount to 20*l*. do not sign within a given time, yet still such an assignment, notwithstanding the condition, will amount to an act of bankruptcy. *Dutton v. Morison*, 17 Ves. 197, 8. So a deed, whereby a bankrupt conveys all his property in trust to be divided amongst his creditors, is an act of bankruptcy, though the creditors with whom such deed is in the first instance concerted, afterwards change their purpose unknown to the bankrupt, and agree to set it up as an act of bankruptcy. *Tappenden v. Burgess*, 4 East, 230. And if partners by deed assign all their partnership effects, &c. to trustees, for the benefit of their creditors, and some of the separate creditors of one partner do not assent to it, the assignment will be deemed fraudulent and void. *Eckhart v. Wilson*, 8 T. R. 140. So an assignment of a part only of the trader's effects in contemplation of bankruptcy, would, it should seem, constitute that act on the score of fraud, by giving a preference to one creditor to the prejudice of the rest, *Round v. Hyde*, Wats. Partn. 251. *Kettle v. Hammond*, Bull. N. P. 40 a. *Alderson v. Temple*, 4 Burr. 2235. *Harman v. Fisher*, 1 Cowp. 123. et vide 3 Serj. Wils. 47; with this exception only, that it cannot be set up as an act of bankruptcy by those who execute or legally assent to it. *Bamford v. Baron*, cited 2 T. R. 594. *Whalley, Ex parte*, 1 Smith's Rep. 118. And a creditor who assents to and acts under an absolute bill of sale for the benefit of creditors, but does not sign the deed, cannot afterwards sue out a commission against the debtor on the ground that the absolute bill of sale is an act of bankruptcy. *Shaw, Ex parte*, 1 Madd. Rep. 598. If all the creditors execute a composition deed, and they are very numerous, a bill to carry the trusts of such a deed into execution may be filed by one creditor on behalf of all the creditors without making the others parties. *Weld v. Bontham*, 1 Sim. & Stu. 91.

It was the repeated doctrine of Lord Mansfield, that every act done with
Except when
free from fraud,
a view to defeat the bankrupt laws, by giving a preference to creditors, is

valuable consideration, *bonâ fide* (d). A mortgage made by K. in 1659, by divers *mesne* assignments vested in N. (e); it was objected that it did not appear that any money was paid upon the original mortgage, and therefore it was fraudulent; and being fraudulent in the creation, though N. paid a valuable consideration, yet this would not purge the fraud, and make it good against one, who was a purchaser *bonâ fide*, and for a valuable consideration *sed not allocatur*: for Holt, Chief Justice, said, that the first mortgage was good between the parties, and being so, when the first mortgagee assigns for a valuable consideration, this was all one as if the first mortgage had been upon a valuable consideration, for then the second mortgagee stood in the first mortgagee's place, and

(d) Comb. 222. 249. 3 Lev. 388.

[*Prodgers v. Langan*, 1 Sid. 133, and

(e) *Andrew Newport's case*, Rep. temp. Holt, 477. S. C. Skin. 423. Et vide *Kirk v. Clark*, Pre. Ch. 275,

post, 1034, where the principal case is commented on by the learned author.—Ed.]

or the subject of it be a copyhold estate.

fraudulent and void; and, if by deed, it is an act of bankruptcy, *Worsley v. De Mattos*, 1 Burr. 467. *Haugue v. Rolliston*, 4 Burr. 2174. *Alderson v. Temple*, 4 Burr. 2235. *Harman v. Fisher*, ut supra. *Hassell v. Simpson*, Dougl. 89. S. C. 1 Bro. C. C. 99. *Devon v. Watts*, Dougl. 86. *Butcher v. Easto*, ibid. 294. But a trader, it seems, may shew a preference to particular creditors, provided it be not done under the apprehension of bankruptcy, and the property so conveyed does not exhaust the whole estate, or what remains is not colourably left. *Jacob v. Shepherd*, 1 Burr. 478. *Unwin v. Oliver*, cited ibid. 481. *Small v. Oudley*, 2 P. Wms. 428. *Manton v. Moore*, 7 T. R. 67. *Compton v. Bedford*, 1 W. Bl. 362. *Law v. Skinner*, 2 ibid. 996. And note, the fraudulent surrender of a copyhold estate in favor of a particular creditor, will not constitute an act of bankruptcy under the statute 1 Jac. 1. c. 15. s. 2, because it does not defeat or delay creditors; the copyhold being neither liable to a *ieri facias* nor to an *elegit*. *Cockshot, Ex parte*, 3 Bro. C. C. 508. But Mr. Christian questions this decision in his *Treatise on Bankrupt Laws*, vol. i. p. 150. The word "conveyance," so deliberately used in the statute, should, in his opinion, comprehend a conveyance of a copyhold estate; and, he observes, that if the reasoning adopted in the above case were to prevail, "a fraudulent assignment of debts," or of "money in the funds, would not be an act of bankruptcy." As to the former, viz. "debts," Mr. Christian refers to *Richardson, Ex parte*, 14 Ves. 186; as to "money in the funds," the objection does not seem to assist Mr. Christian's argument, since no decision is brought forward to support the proposition, that an act of bankruptcy could be supported upon such a transfer.

Other matters as to composition, deed and bankruptcy.

On the subject of this note, the following particulars remain to be mentioned:—A conveyance for payment of debts generally, to which no creditor is a party, nor any particular debt expressed in the deed, is good, as against

therefore was within the proviso of the statute 27 Eliz. c. 4, "that no mortgage, *bond fide*, and upon good consideration, "should be impeached by force of this act, but it should "stand in such force as before the act made;" and if this proviso did not extend to this case, to what case should it extend?

And if a valuable consideration passes, the court in such case will not inquire rigidly into its adequacy, where the object is a family settlement. Therefore, where the defendant's father (f), some time after marriage, in consideration of an additional portion of 100*l.* paid by his wife's mother, (a receipt whereof was indorsed upon the deed), settled an estate of

Adequacy of consideration not rigidly investigated in family settlements.

(f) *Jones v. Marsh*, Ca. temp. Talb. 64.

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the grantor and his heirs, but void as against a purchaser. *Leech v. Leech*, 1 Ch. Ca. 249. But to enable a purchaser to set aside a deed made for payment of debts, he must, it is conceived, be a purchaser for valuable consideration, and have no notice of the deed of trust. See *Langton v. Tracey*, 2 Ch. Rep. 16. *S. C.* Nels. 126. A security, voluntarily given by a trading debtor to a particular creditor, in contemplation of an act of bankruptcy, is void, *Litten v. Bartlett*, 3 Serjt. Wils. 47. *Wilson v. Balfour*, 2 Campb. 579; but if the creditor be very urgent for payment of his debt, the security will be good. *Smith v. Payne*, 6 T. R. 152. *Crosby v. Crouch*, 11 East, 256. *Hartshorn v. Slodden*, 2 Bos. & Pul. 582. *Bayley v. Ballard*, 1 Campb. 416. *De Tasset v. Carroll*, 1 Stark. 88. *Reed v. Ayton*, 1 Holt, 503. And where a conveyance was in trust to satisfy an urgent debtor, and then for relatives, the security was considered good as to the creditor, but void so far as it sought to prefer the relatives. *Morgan v. Horseman*, 3 Taunt. 241. But where a debtor gave a pressing creditor a bill of sale of all his property, and immediately became bankrupt, this was held a voluntary preference, and void. *Thornton v. Hargreaves*, 7 East, 544. If a creditor obtain a mortgage, with notice of a composition deed, his security will be fraudulent and void against the creditors under that deed; but if the composition goes off, and the debtor, four months afterwards, becomes bankrupt on an act not contemplated at the time, the security will be effectual against the assignees in bankruptcy. *Wheelwright v. Jackson*, 5 Taunt. 109. On a proviso in a composition deed, "that if all and every the creditors should refuse to execute or consent to the deed within six months it should be void," it was holden that non-execution of the deed by a particular creditor, was not evidence of a refusal by him to execute or assent, but that it was incumbent on a party seeking to avoid the deed, to shew a positive refusal to execute or assent to the deed. *Holmes v. Love*, 3 Barn. & Cress. 242. In *Watts v. Greenhill*, the question turned on the effect of a proviso by which the deed was to be void in case any creditor whose debt amounted to 100*l.* or upwards, or any two creditors whose debts should amount to 150*l.* or upwards, should not execute the instrument within three months. Two judgment creditors whose debt exceeded 150*l.* did not execute the deed

100*l.* *per annum* upon himself for life, remainder to his first and other sons, &c. and the mother of the defendant's father having an interest in this estate, joined with him in the conveyance; and the father, thirteen years afterwards, mortgaged this estate, with the usual covenants to the plaintiff, and died, the plaintiff brought his bill to foreclose: and the question was, whether the settlement should be looked upon as voluntary and fraudulent against a creditor, who lent his money so many years after? *Et per curiam*. The question is, whether this be a voluntary conveyance or not? here is plain proof that 100*l.* was paid, the receipt being indorsed upon the back of the deed for a consideration of 100*l.* *per annum*; yet, in marriage settlements, things are not to be considered so strictly, there being room for bounty; and every man ought to provide for his wife and family. Besides, in this case there was an estate which moved from the defendant's father's mother, and she might in some respect be considered as a purchaser of the limitations made to her grand-children; so that it would be very hard to call this a fraudulent settlement, since it was in consideration of a marriage had, and of an additional provision of 100*l.* paid by the wife's relations, which could not be called voluntary against a creditor, who lent his money thirteen years after (g).

within the time required; and it was holden that the deed was not thereby rendered void, the intention manifestly being, that those creditors only who were to receive a composition under the deed should execute it. 5 B. & A. 869. It has also been adjudged, that if a creditor executes a composition deed, without specifying the amount of his demand, he thereby binds himself to the extent of his claim, although the terms of the deed are to take the composition for the sums set opposite to the respective names of the creditors who executed the deed. *Harrhy v. Wall*, 2 Stark. 195; et vide Mont. Com. passim. It is further observable, that by the late bankrupt act, 6 Geo. 4. c. 16, every composition deed must be advertised in the London Gazette; but the section alluded to does not, it is apprehended, include a letter of licence.

(G) So in *Stileman v. Ashdown*, 2 Atk. 478, it was held, that a settlement in 1694, being in consideration of a portion paid at the time, though made after marriage, could not be impeached by subsequent creditors. Et vide S. L. in the cases referred to in Mr. Saunders' note (1), 2 Atk. 480. As to a settlement after marriage, in consideration of a parol agreement before marriage, see *Dundas v. Dutens*, 2 Cox's Rep. 235. But see also *Spurgeon v. Collier*, 1 Eden, 62, and the cases referred to in the note there; and it is to be remembered, that a voluntary settlement by a bankrupt, though void against creditors, is still good against himself and heirs. *Bell, Ex parte*, 1 Glyn & Jam. 282.

CHAP. XV.

TO WHOM LANDS FORFEITED, UNDER A MORTGAGE, SHALL
BELONG, IN CASE OF THE DEATH OF THE MORTGAGEE.

GREAT doubts were formerly entertained, when a mortgage was made upon condition, that if the mortgagor, at a certain time, paid a certain sum to the mortgagee, his heirs, executors, or administrators, then the mortgagor should re-enter (a), and the day passed without payment, and the mortgagee died, whether the money should be paid to the heir or executor of the mortgagee? And a distinction was taken between cases (b), where there appeared to be a bond for payment of the money, and the condition of redemption was upon payment to the executors without naming the heir: and those where the mortgage was in fee (c), and there was neither bond nor covenant for payment, or where the condition of redemption was, upon payment to the heir or executor, or heirs and assigns of the mortgagee, and there was no deficiency of assets to pay creditors. For, in the latter cases, the money was decreed to the heir, in the former to the executor; because, upon these circumstances, the court determined whether the mortgagee meant to change the nature of his property, from personal into real (d). But, since courts of equity have considered contracts on mortgages as merely personal, it hath been settled otherwise; and now it is a rule, *in all cases*, that the mortgage money shall be deemed part of the personal estate, and belong to the executor or administrator, *unless* an intention be declared by the mortgagee, or it appears evidently, from his conduct, that it should not

Formerly doubted whether money belonged to heir or executor of mortgagee.

Now settled that it belongs to executor (A 1).

(a) Vide *Pawlett v. Attorney-General*, Hard. 467.

(c) *Tilly v. Egerton*, 1 Ch. Rep. 181.

(b) 1 Eq. Ca. Abr. 326, pl. 1. 2. 1 Ch. Ca. 88. s*ibid.* 187.

(d) *Turner v. Turner*, 2 Ch. Rep.

155. *Turner v. Crane*, *ibid.* 242. S. C. 1 Vern. 170.

(A 1) Or administrator; though mortgagee be in possession at the time of his death, and the estate descends to his heir. *Noy v. Beaumont*, Finch, 305.

be so considered; as if he foreclose or obtain a release of the equity of redemption, and get actual possession of the premises.

Mortgage, personal estate, unless mortgagee direct otherwise.

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Thus (e), where B. lent C. 500*l.* upon a mortgage by lease and release, and it was agreed, by a separate indenture, that if C. should, during his life, pay B., his heirs, executors, administrators, or assigns, 30*l.* by half-yearly payments, at Lady-day and Michaelmas; and if the heirs of C. should, within six months after his death, pay to B., his heirs, executors, administrators, or assigns, the said sum of 500*l.* *then* the lease and release to cease and be void. C. died, leaving other assets, and default having been made in payment, and the premises being thereby forfeited, the mortgage lands descended to his son. On a bill exhibited for redemption, the principal question was, whether the mortgage money should be paid to the heir, or to the personal representative? And it was decreed (by Lord Keeper Finch) that it should be paid to the latter; because the reason of the common law, in these cases, ought to be followed, in equity, as nearly as might be. And, at common law, if conditions or defeazances of mortgages were so penned as to make no mention either of heirs or executors, the money ought to be paid to the executors; for it came out of the personal estate, and therefore ought to return thither again; { it being equitable, *that the satisfaction should accrue to that fund which sustained the loss* (A) }. But where the defeazance appointed the money to be paid to the heirs or executors, *disjunctively*, if the mortgagor paid the money precisely at the day, he might elect to pay it to either of them (B); for that would have been a performance of the condition, which was all he had to do. But, when the precise day was

Money paid at day may be paid to heir or executor.

(e) *Thoraborough v. Baker*, 1 Ch. Hicks, 2 Ch. Ca. 187, *infra*, 665, 6. Ca. 283. *Noy v. Ellis*, 2 *ibid.* 220. *Wynne v. Littleton*, 2 Ch. Ca. 51, 52. 2 Vent. 348. Hard. 367. *Canning v.*

(A) These words are not in the report; they are added by the author. The maxim is *qui sentit commodum sentire debet et onus*. 1 Co. 99.

(B) If, however, he pay it to the heir, it will nevertheless belong to the executor, for whom the heir will be a trustee, post, 665, et vide further on the same subject, ante, vol. i. 271, note (N).

passed, and the mortgage forfeited, all election was gone in law; for, *in law, there was no redemption*. And when the case was reduced to an equity of redemption, it would be perfectly against equity to revive the election of the mortgagor; because that would only tend to a delay of the payment of the money as long as he pleased, and end in compositions to pay the money into that hand which would use him best. And, to say that the election should be in the court, would be to place an arbitrary power therein, which would tend to the inconvenience of the subject; since no man could safely pay the money in such cases, without a suit in equity. And therefore, since there ought to be a certain rule, a better could not be chosen than to come as near as might be to the rule and reason of the common law; and as the law always gave the money to the executor where no person was named, or where the election to pay, either to the heir or executor, was gone and forfeited in law (in which latter case, it was the same as if neither heir or executor had been named in the condition) so equity, following the rules of the common law, ought to give it to the executor. For, in natural justice and equity, the principal right of the mortgagee was to his *money*, and his right to the *land* was only as a deposit or pledge for it; therefore, the money ought to be paid to the proper hand that the mortgagee had appointed receiver of it, which was his executor. And then the heir, who was only a trustee to keep the pledge, ought to deliver it back to the mortgagor; for, though the heir had the use and benefit of the land, until redeemed, yet he had it only as a pledge; consequently, was a trustee to restore it when the money was paid to the proper hand; and the heir himself, though he was proper to keep the pledge, being land, yet was not proper to receive the money, being purely personal. Nor was it hard that the heir should part with the land without having the money that came in lieu of it, because the money was originally parted with from the personal estate, and would have immediately come into the hands of the executor, had it not been placed out in real security; and the right to receive a sum of money the payment of which was a personal duty independent of the condition of the mortgage deed, ought always to be certain, not variable upon circumstances. There-

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Nature of mortgage.

fore it was not material, in this case, that the personal representative had assets without this money; for assets or not assets was not the measure of justice to executor or administrator, but served only as a pretence to favor the heir, who either ought to have the money, if there were no assets, or ought not to have it, although there were. For the same reason it was not material, that there wanted the circumstance of a personal covenant from the mortgagor to pay the money; for though the case of the administrator of the mortgagee would have been stronger with it, yet it was strong enough without it.

Mortgage, and conveyance with agreement to re-convey, distinguished.

In this case, a distinction was taken between a mortgage, and an absolute conveyance with a collateral agreement to re-convey upon re-payment of the purchase money; and the court said, that all mortgages ought to be looked upon as part of the personal estate, unless the mortgagee, in his life-time or by his last will, did otherwise declare and dispose of the same (*f*).

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Heir having received mortgage money, decreed to pay it to executor.

So, where a mortgage was made in fee, and descended to the *heir at law of the mortgagee*, which *heir at law* had been paid the money ten years before application made for it by the *personal representative* of the mortgagee; on the latter exhibiting his bill, he had a decree for it, but without interest (*g*).

Heir trustee for executor before mortgage forfeited.

And if the mortgage be in fee (*h*), conditioned, that the mortgagor shall pay the money to the mortgagee, his heirs, executors, administrators, or assigns; and the mortgagee die before the mortgage forfeited, in consequence of which, the mortgagor has his election to pay the money to either; yet it will belong to the executor.

Receipt by one of several executors before probate, good.

And if there be *several* executors, any or either of them may, before probate of the will as well as after, receive and give a good discharge for the money (*i*).

(*f*) [This case is also fully reported in 11 Vin. Abr. 147 to 152.—Ed.]

(*g*) *Turner's case*, 2 Vent. 348.

(*h*) *Sir Thomas Littleton's case*, 2 Vent. 351.

(*i*) *Austin v. Executors of Dodwell*, 1 Eq. Ca. Abr. 319.

So, in all mortgages in fee, a man's heirs are his trustees for his executors (k).

Heir in every event trustee for executor; though executor have a specific legacy.

The bequest of a specific legacy to the executor, was held not to bar him of money due on mortgage (l). Thus, where a mortgagee in fee, after devising several legacies, gave 100*l.* to his executor, *expressly willing, that he should not be paid until after his debts and other legacies were discharged*; it was argued, in favor of the heir at law, *that* it was a necessary implication that the executor should have no more than the 100*l.*; for it was the same as if he had expressly devised the 100*l.* out of the residue of his estate, after his debts and legacies paid; from which it might be strongly inferred, he meant no more than that sum, and not the whole residue. But the court decreed against the heir (c).

And, if the mortgagor doth not redeem (m), the administrator shall have the land. Thus, where the mortgage was forfeited, the heir in possession by descent, no want of assets, and the mortgagor did not offer to redeem; the heir of the mortgagee was decreed to convey the lands to his administrator; for as the money, being part of the personal estate, would have gone to him, so would the land, which was in lieu thereof.

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Heir of mortgagee decreed to convey estate to mortgagee's administrator;

(k) *Kendal v. Mickfield*, Barn. 50.

(l) *Canning v. Hicks*, 2 Ch. Ca. 187. S. C. 1 Vern. 412. Sed vide 14 Geo. 2. c. 20. s. 9.

(m) *Ellis v. Gnavas*, 2 Ch. Ca. 50. *Canning v. Hicks*, supra.

(C) It is now clearly settled, that a pecuniary legacy bequeathed to an executor will alone afford a sufficient ground for depriving him of the residue. As to the surplus undisposed of, the executor will by such legacy become a trustee for the next of kin. *Gibbs v. Rumsey*, 2 Ves. & B. 294. *Bull v. Kingston*, 1 Meriv. 314. This, it is presumed, is what the learned author alludes to in his reference to the 9th section of the statute 14 Geo. 2. c. 20; a statute which directs "the undivided surplus of estates *pur autre vie* to be applied and distributed in the same manner as the personal estate of the testator or intestate." But, because the executor does not take the mortgage money beneficially, it does not follow that it therefore devolves on the heir. The heir is a trustee for the executor as to the legal estate in the land, and the executor a trustee for the next of kin as to the beneficial interest in the mortgage money. This, it is conceived, is the correct expression of the law.

P. 665
continued.
Legacy to executor debars him from surplus.

though he be administrator de bonis non, if mortgagee be not in possession as owner;

So, where a mortgage was made of a copyhold (*n*) by a surrender thereof to P., who was admitted tenant, and died in 1690, leaving T., her son and heir and executor; T. entered and was also admitted, and afterwards, by his will, but without any surrender to the use thereof, devised it to G., who was also administrator *de bonis non* to P.; then G. exhibited his bill against K., who was heir at law both to P. and T., and who claimed this as a real estate, it having been long since forfeited, two descents having been cast, more being due thereupon than the value of the estate, the mortgagor, by answer, having refused to redeem and submitted to be foreclosed, and the devise by T. to the plaintiff being void, at law, for want of a surrender to the use of the will. But it was decreed to the plaintiff, as administrator *de bonis non* to P.; and the decree was affirmed upon appeal, there being no foreclosure nor release of the equity of redemption, in the life-time of the mortgagee.

or though equity of redemption be released to heir, or foreclosed or barred by time.

Although a mortgagor (*o*), the mortgage being forfeited, releases to the heir of the mortgagee in fee, yet the administrator shall have the benefit of that estate [and release], even though there be no debts. And so it is in case a mortgagor be foreclosed [after the decease of the mortgagee], or in case the mortgage be of so ancient a date, as in the ordinary course of the court, it be not redeemable (*d*); *for, in case the mortgagee be not actually in possession [as owner], it will be looked upon to be personal estate (e).*

(*n*) *Tabor v. Grover*, 2 Vern. 367. *worthy*, cited 2 Vern. 193.
S. C. 1 Eq. Ca. Abr. 328, [and (*o*) *Audley v. Audley*, 2 Vern. 193.
2 Freem. 227.—Ed.] *Wood v. Nos-*

(D) As to this, see ante, vol. i. 360, et seq.

Heir of mortgagee may pay money to executor, and take benefit of foreclosure.

(E) So in *Fisk v. Fisk*, Prec. in Ch. 11, it was held, that a mortgage, though forfeited, and though the heir bought in the equity of redemption, and though there were no defect of assets, should belong to the executor. But it was held that if the heir had been in by descent of such forfeited mortgage when he bought the equity of redemption, and there had then been no defect of assets equity would not have taken it from him. If the land be worth more than the money, it seems the heir may well say to the executor, "I will pay you the money, and take the benefit of the foreclosure to myself." *Clerkson v. Bowyer*, 2 Vern. 67. Mr. Fonblanque adds, "Query, whether the heir could compel the executor to take the money before he had foreclosed?" See 2 Fonbl. Tr. Eq. 285, 5th edition.

And, where there was husband and wife (p), and the wife, having a mortgagee in fee of a copyhold, died leaving issue, which issue was admitted and died, and then the husband, as administrator to his wife, claimed title to the copyhold, being a mortgage, and so part of his wife's personal estate: it was decreed to him against the heir at law, although the latter had been admitted.

Husband administrator of his wife, entitled to her mortgage of a copyhold estate, though her heir be admitted.

So, a mortgage of an inheritance, to a citizen of London (q), hath been held to be part of his personal estate, and divided according to the custom.

Mortgage in fee part of free-man's personal estate.

But if a mortgagor agrees to convey his equity of redemption to the mortgagee (r), and [the mortgagee] dies before the agreement is executed, the heir of the mortgagee shall have the money [in preference to the administrator] (F).

Heir of mortgagee takes benefit of his ancestor's contract.

But, if the possessor of the estate *apprehends* himself to hold it in fee, his interest will not be considered as personal, against his evident intention. As, if a mortgaged estate be sold by the mortgagee, to a third person, who means to realize, but is deceived in his purchase; the money paid by him will on repayment, go as the estate would have done. For, in this case the intention of the vendee is to alter the nature of his property, and to invest his personal estate in the purchase of land; and therefore the court will consider it *as land*, when, by an accident, his intent would otherwise be frustrated. Thus, where a mortgagee in fee entered (s), and after seven years enjoyment, sold the lands absolutely to I. S. and his heirs; the court decreed, that the estate should not be looked upon to be a mortgage, in the hands of I. S., so as to make it part of his personal estate, but should be deemed real property for the benefit of his heir.

Mortgagee seven years in possession sells to A. who dies, A.'s heir preferred to his executor.

(p) *Turner v. Crane*, 1 Vern. 170.

(s) *Cotton v. Isles*, 1 Vern. 271.

(q) 1 Ch. Ca. 285. 1 Vern. 4.

[S. C. 1 Eq. Ca. Abr. 273, pl. 2. Ibid.

(r) *Tilley v. Egerton*, 3 Ch. Rep. 328, pl. 6, and Barn. Ch. Ca. 46.—
35. 63. Ed.]

(F) In the 4th edition this point is erroneously stated and referred to. The above corrected paragraph is sanctioned by the report.

Executor not entitled against mortgagor's intention to devise land as real estate.

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So, if it appears to be the intention of the mortgagee, that the mortgage should pass, by devise, as a real estate, the executor will not be entitled (†). As, where the testator (u), having several mortgages, and among the rest, a mortgage in fee of lands in F., devised his mortgages to his two daughters, their executors and administrators, and his lands in F., upon which he had entered upon forfeiture of the mortgage, to them and their heirs; M., one of the daughters, dying without issue, H. her husband and administrator, claimed a moiety of the lands in F., as part of the wife's personal estate, it being a mortgage not foreclosed, or the equity of redemption released. But it was held, that, although it was a mortgage, as between the mortgagor and mortgagee, yet the testator's intent was, that it should pass to his daughters, as a real estate to them and their heirs, and not as part of his personal estate; and that M., the wife of H., being dead without issue, it descended and went to her sisters, as her heirs at law; and that H., as administrator to his wife, ought not to have any part thereof as personal estate (g).

Except assets fall short.

But where a mortgage was devised as real estate, after a decree of foreclosure *nisi*, it was held to be personal estate for payment of debts (x), if assets fell short, though considered as real estate between devisor and devisee.

Mortgage will not pass as land under description applicable to it in point of locality merely (u).

But a mortgage will not pass *as land* under a general description, applicable to it in point of locality, if there be other circumstances sufficient to shew, that the owner considered it as personal property.

(†) *Martin v. Mowlin*, 2 Burr. 969; S. C. Glb. Ch. Rep. 2. Pre. Ch. infra, 694. 265.

(u) *Noye v. Mordaunt*, 2 Vern. 581.

(x) *Garrett v. Evers*, Mos. 364.

(G) "The same not being devised as a mortgage but as lands of inheritance, but if there are any other lands contained in the mortgage, which are not within that distinction, then that such lands ought to be taken as the testator's estate of inheritance not devised or disposed of by the will, and that the profits thereof ought to be applied as lands not devised by the will." Reg. lib. 1706. B. fol. 370, per Mr. Raithby's very valuable edition of Vernon.

(H) The case of *Martin v. Mowlin*, has been considered on other points, in a former note. See ante, vol. i. 267, n. (L).

Thus where A. B., and R. B. his wife (y), entitled to certain copyholds of inheritance, situated in the manor of Wyke Regis, surrendered the same to W. on mortgage, and the mortgagee entered thereupon, and was in possession at the time of his death; the money was not paid according to the conditions of the surrender, and the equity of redemption of the estate was not foreclosed or released during the life of W. But W. surrendered the estate, and divers other copyholds in the said manor, and after describing several other copyhold estates, the surrender proceeded thus, "*ac etiam un' claus' pasturæ de novo inclusum, continen' per estimationem duodecim acras, &c. &c.*" (describing the premises in question.) *Nec non totum statum jus titulum interesse clam' et demand', quæcunque prædict' W. tam in lege quam in æquitate de et in præmissis prædict', et qualibet in de parte et parcella ad opus et usum prædicti W. pro termino vitæ suæ, et post ejus decessum, ad opus et usum talis personæ sive personarum cui vel quibus et pro tali statu sive statibus qual' ipse prædictus W., per ultimam voluntatem suam aut per aliquod aliud scriptum, sub manu et sigillo prædicti W., dabit, devisabit, limitabit, declarabit sive appunctuabit; et pro defectu talis donationis devisamenti limitationis declarationis sive appunctuationis ad opus et usum rectorum hæredum ipsius W. in perpetuum secundum consuetudinem manerii prædicti. Super quo, ad istam eandem curiam venit prædictus W., et cepit de dominis et firmar' prædictis præmissa prædicta superius sursum reddita cum omnibus et singulis eorum pertin', habend', tenend' omnia et singula præmissa prædicta cum suis perti' præfato W., pro termino vitæ suæ, et post ejus decessum, tali personæ, sive personis cui vel quibus, et pro tali statu sive statibus qual' ipse prædictus W., per ultimam voluntatem suam, aut per aliquod aliud scriptum sub manu et sigillo suis, dabit, devisabit, limitabit declarabit sive appunctuabit, prout superius limitatur et pro defectu inde, rectis hæredibus ipsius W. in perpetuum, secundum consuetudinem manerii prædicti: SUBJECT' tamen separabilibus CONDITIONIBUS in quibusdam copiis rotulorum cur' manerii præd' mentionat quarum separal' da' sunt prout sequen, &c. &c."*

Afterwards W. made his will, and therein, after a variety of devises and

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bequests proceeded thus : " And whereas R. B., widow, stands indebted to me, in a considerable sum of money, I do hereby appoint and give her twelve months time after my death to pay the same, and do give her 50*l.* to be allowed out of the same debt." And then proceeds, "*Item*, ALL my lands, tenements, and *hereditaments*, WITHIN, AND PARCEL OF THE SAID MANOR OF WYKE REGIS, and also all other my lands, tenements, and hereditaments, in the county of Dorset (charged as above-mentioned) I do give and devise unto my son H. W., and unto A. his now wife, and to the heirs of the body of my said son, H. W., on the body of the said A. lawfully begotten, and, for default of such issue, unto my right heirs for ever. *Item*, I give and bequeath to my said son H. W., all my goods and chattels and personal estate whatsoever; he paying my debts, and legacies, and funeral expences." And one question, necessary to be decided, was, whether the testator meant to devise this mortgage, as part of his real or personal estate? *Et per* Lord Mansfield, as to the construction of the will of W., if it appeared that the testator really meant and intended to devise the mortgaged premises as land, it would then be a devise of land; the mortgage being forfeited by law, and the estate in the land become absolute. But if it appears that the testator meant and intended it as a bequest of money only, then it would be considered in a court of equity, as a specific bequest of the money: and a court of equity would not direct the money to be laid out in land, without express words in the will to ground such direction upon. It seems to me, that the testator all along understood this to be part of his personal estate, and that he meant to dispose of it as such by his will. He surrendered it as charged *with a condition of redemption and surrenderer*. And in his will, he manifestly considered it as a debt due from Rachel Buckler, and that debt as part of his personal estate. Though the testator has not in his will mentioned this estate to be redeemable, yet he has done so in the *surrender to the use* of his will, he surrenders it as liable to a condition in equity (for at law it was become absolute) and there had not run above eight or nine years upon this mortgage, when he made this surrender; so that he appears to have made the surrender of it, only to substantiate his claim upon the estate, and upon the face of the surrender plainly considered

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it as *redeemable*. And so he did in his will too. We must take it upon the will, that the widow B. owed him no other debt but this: *de non existentibus, et de non apparentibus eadem est ratio*. He gives her time to pay it; he gives her a specific legacy out of it; he gives it as a debt towards payment of his debts and legacies: "I give and bequeath to my son H. W., all my goods, chattels, and personal estate whatsoever, he paying *my debts, legacies, and funeral expences*." And there is nothing to control this, but the general words, "all my lands, tenements, and hereditaments, within, and parcel of the said manor, &c." But his *creditors* and *legatees* had a right to have it considered as *personal* estate. Therefore, we all agree in opinion, "that he meant to pass it as a DEBT:" and there is no colour to imagine, that it could be considered in a court of equity, as a specific bequest of money, which they would direct to be laid out in land.

And, where money secured by a mortgage (to which the executor was legally entitled) was articulated to be laid out in land (x), and settled on the issue of the marriage, it was by Hale, Chief Justice, on a special verdict, adjudged to be bound by the articles.

Mortgage money articulated to be laid out in land, considered as land.

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If two persons advance a sum of money on mortgage (a), and take the mortgage to themselves *jointly*, without inserting in the deed the words *to be equally divided between them*, and one of them dies; when the money comes to be paid, the survivor shall not have the whole, but the representative of him that is dead shall have a proportion, because, from the nature of the transaction, the court presumes this to be the intention of the parties (1).

No survivorship between joint mortgagees.

(x) *Lawrence v. Beverley*, cited 3 P. Wms. 317, [and in 1 Vern. 471, stated also in *Buden v. Pembroke*, 2 Vern. 55, and reported 2 Keb. 841. In what cases money covenanted to be laid

out in land, is considered in equity as real estate; see 1 Foub. Trea. Eq. 420, 5th edit.—*Ed.*]

(a) 2 Ves. 258.

(1) This shews the utility of the clause in the common forms, declaring when money is advanced by trustees, that it is advanced by them as joint-tenants

Joint mortgagees trustees for each other.

On redemption each shall have the money he advanced with interest (x).

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Thus, where N. and S. lent 2000*l.* to G., on mortgage (b), 1450*l.* whereof was the money of S., and 550*l.*, the residue, the money of N., and it appeared, by a note under both their signatures, that the 1450*l.* was delivered by S. to N., and that, if the mortgage was paid off, then the 1450*l.* with interest thereon, was to be re-delivered into the hands of S., for the uses of his will. Afterwards, and before the day of redemption, S. made his will, reciting the above memorandum, and disposed of his share thereby. The lands were redeemed on the day, and the whole money and interest paid to N., S. being dead, and he claiming it by survivorship. But, on a bill exhibited by his executor, the court was clearly of opinion, that by equity, there ought to be no survivorship in a case of this nature; and that the note, under the hands of both the parties, and the will of S., shewed plainly that there was a trust between them, *that* on re-payment, each of them was to have his money, with interest.

Executor of deceased mortgagee proper party to transfer of mortgage.

The consequence of the above principle is, that the executors of the deceased mortgagee should, on transferring or re-

(b) *Petty v. Styward*, 1 Ch. Rep. 2 Ves. 238. [3 Ves. 631, and 1 Atk. 31. 1 Eq. Ca. Abr. 290. Et vide 467.—Ed.]

on a joint account. And it is observable, that if lands are mortgaged to A. and B., and A. only pays the money, the intention being that B. should take nothing, B. will be a trustee for A., and compellable to release when called on. Cary's Rep. 19. And in an anonymous case in Carthew, p. 16, it appears to have been held, that joint mortgagees are trustees for each other.

No survivorship if money paid in unequal shares.

(K) In reference to purchasers the rule is, that if two persons buy an estate, and pay equal proportions of the consideration money, taking a conveyance to them and their heirs, it is a joint-tenancy, that is, a purchase by them jointly of the chance of survivorship. But when the proportions of the money are not equal, and this appears in the deed itself, this makes them in the nature of partners; and however the legal estate may survive, yet the survivor will be considered but as a trustee for the other, in proportion to the sums advanced by each of them. So if two or more make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs and improvements, and dies, this will be a lien on the land, and a trust for the representative of him who advanced it. Per Master of the Rolls, in *Lake v. Gibson*, 1 Eq. Ca. Abr. 291, pl. 3. S. C. 3 P. Wms. 158, sub nomine *Lake v. Craddock*. The maxim among merchants and traders, is *jus accrescendi inter mercatores pro beneficio commercii locum non habet*. Et vide, for further cases on this subject, 2 Bridgm. Index, 3d edit. tit. *Local Customs*, p. 274. As to improvements, see *infra*, 957.

transferring the mortgage, be a party to direct the surviving trustee to convey; for the surviving mortgagee is a mere trustee for the executors of the deceased mortgagee (L).

And if two persons, being mortgagees (c), foreclose the mortgagor, the mortgaged estate shall be divided *between* them (M), because their *intent* is *presumed* to have been, that it should be so divided (N).

On foreclosure by two mortgagees, estate divided between them.

(c) 2 Ves. 258.

(L) Some gentlemen think it sufficient to treat the surviving mortgagee as a trustee for the other, and consequently that a good discharge can be procured by payment of the money to him. The anonymous case in Cary's Reports, mentioned in the last note but one, seems to sanction this practice, but to avoid all doubt, the executor should be made a party.

Parties to transfer of mortgage.

(M) According to the proportions of the money they respectively advanced.

(N) And if they purchase the equity of redemption they shall also hold the lands as tenants in common. *Edwards v. Fashen*, Pre. Ch. 332. S. C. 1 Eq. Ca. Abr. 292; infra, 1142.

CHAP. XVI.

HOW A WIFE IS INTERESTED IN HER HUSBAND'S ESTATE
MORTGAGED, AND OTHER MATTERS RELATIVE THERETO.

*Wife joining
her husband in
fine, bars her
right to dower.*

BY the common law a married woman could not, by joining with her husband in any deed or conveyance whatsoever (a), bar herself of that portion of her husband's real property, which the law hath provided for her support in case she survives him. And it was formerly held (b), that a married woman did not bar herself of her right to dower, by joining her husband in a fine; but the case is now altered in that respect, as it hath been long settled that, if a husband and wife join in levying a fine of the husband's estate, the wife is thereby barred from claiming her dower out of the lands which are comprehended in the fine. Because she having nothing in these lands in her own right, her joining her husband in a fine, could be for no other purpose, but to bar herself of her dower; but a fine levied by the husband alone, does not bar his wife of dower (A).

*And she may
by fine bar her
jointure, pro-
vided jointure
be good bar of
dower.*

A woman may also bar herself of her jointure (c), by joining (B) her husband in levying a fine of it, provided it be made

(a) Cruise on Fines, 130.

(c) 1 Inst. 36 b. Dyer, 358 a. [et

(b) Plowd. 373. 2 Rep. 93 a. vide S. L. Dyer, 358 b. 1 Balstr. 173, 10 ibid. 40 b. Vide Glanv. lib. 2. and 1 Leon. 285.—Ed.]

c. 3. Ibid. 133.

*Wife barred of
dower by non-
claim and re-
covery.*

(A) Except five years have elapsed since the death of the husband, and the wife during that time has neglected to sue for her dower. She will then be barred by the five years non-claim on the fine, provided she be under no disability during that period. *Menville's case*, 13 Co. 19. Co. Litt. 326 a. And, it is observable, that her second marriage will form no impediment; for the non-claim on the fine having begun to run, will continue to run, notwithstanding any subsequent disability. 2 Pres. Abs. 339. And a married woman will be barred of dower and jointure, and all other rights in the estate, by joining her husband in a common recovery. See Cov. Rec. p. 182.

(B) The fine must be levied or recovery suffered with the husband through whom the jointure is derived; for the widow cannot bar her jointure

pursuant to the statute 27th Hen. 8, and be a good bar of dower; because the wife, by accepting such a jointure before marriage, barred herself of her right to dower, so that she can claim nothing after her husband's death, but her jointure, which she herself concurred in destroying. But, if a jointure be settled on a woman after marriage (in which case it is no bar of dower) and she joins her husband in levying a fine of it, this will not prevent the wife from claiming dower out of any other lands, whereof her husband was seised during the coverture; because, the jointure being no bar of dower, the wife had her election on her husband's death, either to accept of the jointure, or to claim her dower. And therefore Sir Edward Coke says, that a fine levied of her jointure before her time of election, is no bar to her right of electing dower, when her time of election does come.

And if a married woman join her husband in a fine, it will bar her of any particular interest she hath in the lands comprehended therein, as well as from claiming dower, or a jointure out of those lands.

And every interest she may have in land.

Thus, where a man, on his marriage (d), entered into a bond for 600*l.* to a trustee, with a warrant of attorney to confess judgment thereon, to be defeasible on the payment of 300*l.* to his wife, if she should survive him, and the wife afterwards joined the husband in a fine of all his lands; it was resolved, that the fine not only bound the wife from claiming dower out of the lands, but destroyed her interest in the judgment. And the Lord Keeper decreed, that the wife should procure satisfaction to be acknowledged on the judgment.

Wife's interest in husband's judgment barable by fine.

(d) *Goodrick v. Sherbolt*, Pre. Ch. 333. *S. C.* by the name of *Shotbolt v. Biscow*, Gilb. Eq. Ca. 18.

when sole, or with an after-taken husband. Indeed, a fine or recovery levied or suffered by her then, would amount to a forfeiture of her jointure. See 1 Rep. Bar. & Fem. 591—607, and Cov. Rec. p. 213; but see the last section of 11 Hen. 7. for exceptions.

Wife may incumber her dower or jointure.

And as a wife may, by levying a fine, absolutely bar herself of her dower or jointure; so may she thereby charge or incumber her interest therein.

Agreement that wife shall redeem good, notwithstanding fine.

But in such case (e), where [the wife joined her husband in a mortgage, and levied a fine to the intent to bar her dower, and] the husband agreed that she should have the redemption of the mortgage; in regard the wife, in confidence of this agreement, had levied the fine, and thereby barred her dower, the husband and wife being both living, the court decreed, that after the husband's decease, the wife, in case she should happen to survive him, should enjoy her dower.

Except against creditors, and then subject to such creditors.

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But the husband having in this case mortgaged the estate twice more (f), such agreement was held fraudulent against the subsequent mortgagees, so far as it entitled the wife to the whole equity of redemption. But, notwithstanding the mortgagees pressed that the decree might only be, that she should enjoy her dower notwithstanding the fine, the court thought it unreasonable to put the wife to her writ of dower, because they might convey away the estate, and she not know against whom to bring it; and therefore decreed the dower to her (c).

(e) *Dolin v. Colman*, 1 Vern. 294.

(f) *Ibid*.

Redemption reserved to husband and wife jointly, latter endowable, subject to mortgage notwithstanding fine.

(C) In the case of *Jackson v. Parker*, Amb. 687, Sir T. Sewell, M. R. laid hold of the circumstance of the equity of redemption being limited to the husband and wife jointly, to infer an intention, that the wife should in equity retain her right to dower subject to the mortgage debt. In that case Sir John Jackson, tenant in tail of the lands in question, made a mortgage by lease and release and fine, in which his wife joined, to Frances Stubbs, and in which there was contained a proviso, that if the said John Jackson and Esther his wife, their heirs, executors, administrators, or assigns, should pay the mortgage money and interest, then Frances Stubbs, her heirs or assigns, should re-convey the premises to the said John Jackson and Esther his wife, their heirs or assigns; and there was a clause at the end of the deed which declared the uses of the fine to be (subject to the payment of the mortgage money and interest) to John Jackson, his heirs and assigns. Upon a question as to what interest the wife took in the equity of redemption on this mortgage, it was argued, that the court would put a true construction on the deed, by taking into consideration the ownership of the estate, and the purpose for which the deed was made: that the husband was the owner of the estate, and the intention of the deed was merely to make a mortgage; and that the wife was made

Notwithstanding these principles, if it appears not to have been the intention of the husband and wife, in levying a fine, to bar the wife's jointure, the fine will not affect it. Thus, where W., and R. his wife (g), being seised of lands to them, and the heirs of W., did, by indenture, bargain and sell the same to P. in fee, subject to a proviso, that if W., or his wife, or the heirs of W., paid 100*l.* to P. at a given day, that then

Fine no bar of jointure, if not so intended on construction of whole deed, preferring first of repugnant clauses to last.

(g) *Southcoat v. Manory*, Cro. Eliz. 744.

a party and joined in the fine for the sake of the mortgagee, and for no other ulterior purpose. Sir Thomas Sewell, adopting this argument, was of opinion, that, notwithstanding the language of the proviso, there was no room to presume any contract between the husband and wife, by which the latter was to take a joint interest in the equity of redemption in lieu of her dower, for that if it had been so, it would have been recited in the deed. And his Honor observed, the wife's right of dower accounted for her joining in the fine. *The deed was planned as between mortgagor and mortgagee.* The wife had a right to redeem; and if she had redeemed a court of equity would not have taken the estate from her but upon the terms of allowing her dower. The deed had declared the rights of the parties. The uses of the fine were declared after payment of the mortgage money to the husband and his heirs. The wife would then be entitled to dower again, after the money paid, by the husband taking the estate in fee.

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continued.

Hence arises the general understanding of the profession, that a fine, although an absolute bar at law, may in equity upon the ground of its having been levied for a particular purpose, be restrained from operating to exclude the widow from her dower, except to the extent of the particular purpose contemplated. And this general opinion is still further confirmed and enforced by the following cases:—In *Goodrick v. Brown*, 1 Ch. Ca. 49, it was resolved, that whereas by a decree of the Court of Chancery, a fine was levied to a particular end and purpose, which would operate further in point of law than to the end which the decree ordered it; it was resolved, that such fine should not be suffered in equity to work farther than the decree intended. On the same principle, in a MS. report of *Mrs. Danby's case*, 3 Eq. Ca. Abr. 385, pl. 2. S. C. Pr. Ch. 34, cited, it is said, "A wife joined with her husband in a fine, in order to make a mortgage, which afterwards was not made: the husband died, and the wife brought a writ of dower, and got judgment by default; and the heir could not be relieved against in equity as he would have been, if the fine had been a bar of her dower in equity as it was at law." The court must therefore in effect have decided, that the fine was no bar in equity, the particular purpose having failed. It seems however to have escaped observation, that as no mortgage was made, the use resulted to the husband, and consequently the fine was no more a bar at law than it was in equity. In *Naylor v. Baldwin*, 1 Ch. Rep. 130, Richard Baldwin made a mortgage by demise to one Tirrel for securing 400*l.*, lent by Tirrel, and, to confirm the

Fine a total or partial bar in equity according to intention of parties.

it should be lawful to them, and to the heirs of W., to enter, and to re-have and enjoy, as in their former estate, this indenture notwithstanding; and that then, after such a payment, this indenture, and all other fines and assurances, to be passed between the said parties, should be to the use of W. and his heirs (leaving out the wife here); and lastly, it was agreed thereby, that all fines and assurances, to be made between the parties within seven years following, should be to the uses, intents, conditions, grants, and agreements, before therein expressed, and to no other use, intent, and purpose, &c. The deed was not enrolled. W. and R. his wife, within seven years, levied a fine, according to that indenture, to P. Afterwards W. died. His wife at the day paid the 100*l.* and entered. Then one entered by command of the heir of W., pretending that by the payment of the 100*l.* the fine was to the use of the heirs of W., and not to the wife; but resolved unanimously, *per curiam*, that the wife should have an estate for life; for so was the condition, and the first part of the clause; and the other part of the clause, or middle clause, was not repugnant, but stood well with it, that it should be to the use of the husband and his heirs, and did not controul the limitation to the wife for her life; and when both clauses might, by any construction, stand, it was to be construed accordingly; and the last clause expounded this fully, *viz.* "That all assurances

mortgage, Baldwin and his wife acknowledged a fine to Tirrel. On a bill in equity for divers matters, the court is reported to have said, "As for Mrs. Baldwin's dower, unless she have barred herself *totally* by levying the fine, the court makes no order therein at present, but declares that if she levied the fine *only to secure the lease* [that is, the mortgage], no debt could bar her, except Tirrel's debt on the lease." The court here evidently refers to the doctrine under consideration, and admits clearly that the fine may operate as a total or a partial bar to dower, according to the intention of the parties.—Whether a corresponding statement can be made as to the operation of a fine in a court of law, the cases do not warrant us in deciding; but no sound reason occurs why a court of law should not adopt this equitable principle, and restrict the effect of the fine to the purpose intended, in the same manner that it restrains the operation of any other species of conveyance. See Co. Litt. 42 a. 183 a. Cru.Dig. tit. xxxii. c. 19. and *Davies v. Bush*, 1 M'Lel. & Yo. 58.

For the modern determinations, and the general result of cases, see the next note.

should be to all the uses contained in the indenture," whereof this was one; and that if all the clauses could not stand together, the first should stand rather than the last.

So, where a jointure was settled upon a woman (*h*), issuing out of some houses in London which were burnt down, and she joined her husband in a fine of the houses, to create a long term for raising money to rebuild them, upon an agreement that she should have her jointure out of the reserved rent thereof; it was adjudged, that the fine did not affect the jointure.

Agreement that fine shall not affect jointure, good.

Again, where A., upon a marriage between him and B. (*i*), and in consideration of 500*l.* which she brought as her portion, settled an annuity of 50*l.* *per annum* on her during her life, issuing and to be paid out of several lands; A. afterwards mortgaged the lands to C., and prevailed with B. to join him in a fine of part of the mortgaged premises; and, upon a bill brought by B. to have the said annuity settled on her as aforesaid paid in future, and also to have the arrears thereof, it was insisted on the part of A. and C., that, *by the fine*, she had *extinguished* her right to the annuity; but it appearing, upon reading some proofs, and producing deeds, that C. had *notice* of this annuity *before* his mortgage, and that it was excepted in the mortgage, and that it was *never* intended that she should extinguish this annuity by joining in the fine, the court decreed that the annuity should be paid in future, and all arrears thereof up to the time of the decree (*D*).

Wife's annuity not barred by fine—it being excepted in mortgage deed, and not intended to be destroyed.

(*h*) *Anon.* 1 Skin. 238. [S. C. nom. *Brond v. Brond*, post, 731, 2.—Ed.]

(*i*) *Solly v. Whitefield*, Finch, 277.

(*D*) The earliest mention of the doctrine under consideration is to be found in the case of *Cotton v. Cotton*, in the time of Lord Nottingham, 2 Ch. Rep. 72. 138; 8vo. edit. 30 Car. 2. The cause was heard by Mr. Justice Wyndham; and the application of the doctrine of resulting trust appears incidentally in the report of the decree, which contains the following declaration:—"And as to the mortgage made to Perkins by the said Nicholas, and the defendant his relict, it appearing that part of the mortgage lands were, before that mortgage was made, settled on the said Nicholas and Catherine in jointure, or otherwise, so as the same came to her as survivor, this court is of opinion,

Earliest case on this head.

Joint answer in Chancery equal to fine.

And an answer in Chancery by a *feme covert* has been adjudged as equal to a fine, in binding her trust estate by her

Fine levied to secure mortgagee, does not bar wife of dower. Contra, when.

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that the equity of redemption belongs to her as survivor, and not to the plaintiff," who claimed it as the heir to Nicholas her husband.

The intermediate cases have been previously noticed. See the preceding note. The two recent cases of *Ruscombe v. Hare*, 6 Dow. Parl. Rep. 1, and *Innes v. Jackson*, 1 Bligh. Parl. Rep. 126, remain to be considered. The rule fixed by the former of these cases is this,—If the equity of redemption be reserved to the husband, upon a mortgage, by fine of the wife's estate, and there is nothing more in the transaction, the courts will hold that no alteration of the previous rights of the parties hath been effected. See this case stated more at large in the note to p. 726, 7, post. If, however, other circumstances occur, affording evidence of an intended change of ownership, the fine will be held to operate beyond the particular object of securing money, and will confirm the equity of redemption to the person intended to take it. Accordingly, in *Innes v. Jackson*, *ubi supra*, where the wife joined her husband in the mortgage of her estate by fine, and the proviso was simply, 'that if the husband or wife paid the money at the day the term created by the deed should cease,' and the declaration of the uses of the fine were in an after part of the deed declared to endure 'to the use of the mortgagee during the term, subject to the said proviso; and, after the expiration of such term, to the use of the husband and wife for their lives and during the life of the survivor, and after both their deaths to the use of the heirs of their bodies, and for default of such issue to the use of the right heirs of the survivor of them the said husband and wife,'—it was held, that these latter limitations in the deed were distinct from the transaction of the mortgage, which prevented a resulting trust for the benefit of the heirs of the wife. This case is also stated more fully, post, pages 726, 7, *in nota*. And it is observable, that though the above cases refer more particularly to the wife's estate of inheritance, yet the principle of them, it has been held, is equally applicable to instances where the wife joins her husband in a fine of her jointure lands, or of that portion of her husband's estate which she is or may be entitled to as *tenant in dower*. See 1 Bligh. Rep. 126.

General rule.

The practical rule to be collected from a review of all the cases on this head is, that if the wife concur with her husband in a fine of lands to which she is or may be entitled in right of her dower or jointure, for the purpose of improving the title of a mortgagee, and the mortgage deed contains no limitation of the estate beyond the security, and reserves the equity of redemption to the husband alone, then the fine which the wife has levied to give effect to the mortgage will operate for the security of the mortgagee only, and not absolutely to bar the wife of her dower or jointure as against the husband's heir, volunteer, or purchaser; and this, on the principle, that nothing more appearing on the face of the instrument to have been intended than the primary object of borrowing and securing money, the deed and fine shall operate no further or otherwise. But if the mortgage deed contain a settlement of the property over and beyond the mere purpose of security, as if there be a mortgage for years, or a mortgage in fee, and the proviso for

mortgage. Thus (k), where an estate was purchased in trust for the husband and wife and their heirs, and the husband

(k) *Anon. Mos. 248. Et vide Ellis v. Atkinson, 3 Bro. C. C. 565, and cases cited there.*

redemption be simply, that on payment of the money the term or estate of the grantee shall cease, and afterwards the fine is declared to enure in corroboration of the term or estate of the mortgagee, and then to uses in strict settlement, or to uses which add nothing to the security of the lender of the money, and the persons taking under such uses and limitations are different from those who were entitled to the estate before the mortgage was executed, in such case the fine will operate to bar the wife of dower or jointure, to the extent of such uses and limitations, on the ground, that such arrangement was intended and agreed on, with the privity and consent of the wife, previously to her acknowledging the fine and executing the mortgage assurance, though such agreement may not perhaps be recited in the formal or indeed in any part of the instrument. In general cases an answer to the following question will decide the point:—Has the husband a less or a greater, or the same estate, after the execution of the mortgage (considering such mortgage as no diminution of his estate), than, or as he had before the mortgage transaction commenced? If there be no substantial and intended alteration of right, and the husband stands seised in fee, or of his former estate, subject only to the mortgage, dower will result to the wife notwithstanding the fine. But if there be a variation of ownership, and the husband takes the equity of redemption under a modification different from that under which he before enjoyed the estate, such modification being clearly proved (either by the deed itself, or as it should seem by parol evidence, post, 729, 3d) to have been made with the privity and consent of the wife, or arising by necessary implication, then the widow must submit to be postponed to the uses and limitations which she has intentionally concurred in creating.

A case which recently occupied the attention of the writer affords an apt illustration of the subject of this note. By indentures of lease and release, dated 11th and 12th November, 1814, between I. P. and Mary his wife of the one part, and I. D. of the other part, reciting a will under which I. P. was devisee in fee, and that he had occasion for the sum of 1000*l.*, which the said I. D. had agreed to lend him on the security after mentioned: It was witnessed, that in consideration of 1000*l.* to the said I. P., paid by the said I. D., the said I. P. conveyed and assured the premises in question unto and to the use of the said I. D., his heirs and assigns for ever, subject to the proviso or condition for redemption thereafter contained: And for barring and extinguishing the dower and thirds which the said Mary the wife of the said I. P. should or might *thereafter* have claim or be entitled to out of the said premises, and for better and more effectually conveying and assuring the same unto and to the use of the said I. D., his heirs and assigns, subject to the proviso for redemption thereafter mentioned, the said I. P. for himself and his heirs, and for the said Mary his wife, covenanted with the said I. D. to levy a fine (which was afterwards levied); and it was declared that such fine should enure to the use of the said I. D., his heirs and assigns for ever, sub-

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Case in practice, where fine was considered only a partial bar of dower.

and wife joined in a mortgage to the vendor, to secure 500*l.* part of the purchase money; the mortgagee brought a bill of

ject to the proviso for redemption thereafter contained, viz. that if the said I. P., his heirs, executors, administrators, and assigns, should pay unto the said I. D., his executors, administrators, or assigns, the sum of 1000*l.* with interest, on the 12th November, 1815, then the said I. D., his heirs or assigns, should and would upon the request, and at the costs of the said I. P., reconvey and re-assure the said premises unto the said I. P., his heirs and assigns, or to such other person or persons as he or they should for that purpose nominate or appoint, freed and absolutely discharged of and from all incumbrances committed by the said I. D. in the mean time.

Opinion that it was an absolute bar,

A gentleman of much eminence inclined to the opinion, that by this fine and declaration of uses Mrs. P. was *completely* barred of dower. His sentiments were couched in the following language:—"Whether Mrs. P. in case she survives her husband, could redeem against the purchaser, will depend on the intent shewn in the deed declaring the uses of the fine. If the fine was merely to let in the mortgage, I think it clear she might. But the language of the deed goes much beyond the mortgage; for it is declared that the fine is to be levied for extinguishing the right to dower which she *then* had or might *thereafter* have in the premises. It seems to me these words are strong enough to preclude her right to redeem as dowress."

Reasons for considering it otherwise.

On the other hand it was contended, that "the rule was explicitly defined by Lord Eldon, in *Innes v. Jackson*, 16 Ves. 356, (cited at large, post, 726, 7) and though that case was over-ruled in the Lords (1 Bligh, 104), yet that the rule laid down by the noble Lord, whose decree was reversed, was right, the application of it only, being mistaken; that a similar principle prevailed in reference to the doctrines of revocation and renewals, and in all the three instances the court was guided solely by the intention of the parties apparent on the face of the instrument; that it might as well be argued, that the husband levying a fine to a mortgagee, levied it to him *absolutely*, as that the wife joining in a fine for the further security of a mortgagee, barred herself of her whole title to dower; that the rule being admitted, it was observable on the language of the deed that the words explained themselves. The sentence alluded to was of the common form and consisted of two parts, the one answering the other,—not of two sentences, for then each became unintelligible. The right and title of dower was to be extinguished,—for what purpose? The occasions on which the wife joined were sales and mortgages, and therefore the common form was,—if the former, for the purpose of more effectually conveying the estate to the purchaser absolutely;—if the latter, for the purpose of more effectually conveying the premises to the mortgagee *with a proviso*. The wife joined for better securing, &c. but how could she more effectually secure? Only by extinguishing her dower subject to the mortgage. That as to the word *thereafter*,—it was not enough to extinguish the dower which the wife *then* had; for that was but inchoate and imperfect, and could add but little to her more effectual assurance: it was necessary to carry the point further, and extinguish her right to dower when perfect and complete, which could only be *thereafter* when her husband was dead. The word "*thereafter*" was a necessary part of the sentence, alluding to a "*thereafter*" during the

foreclosure, and the husband and wife put in a joint answer; the husband died, and a motion was made for the wife, that she might amend her answer, put in by coercion during coverture, and she insisted on the mortgage not being obligatory on her, because no fine was levied; *sed per* Lord Chancellor, I shall not grant this motion; for though the mortgage is insufficient at law, I shall consider it as a good mortgage, since

continuance of the mortgage. That the deed was to be looked at as a thing entire, the disjointed parts could not have an effect separately; for then the husband conveyed *all his estate* which would include his equity of redemption. The object of the deed was a mortgage. What was the consideration? the mortgage-money. What, the consideration to the wife? the loan to her husband. The whole deed proceeded on the idea of a mortgage, no other object was contemplated, otherwise it would have been apparent on the face of the instrument. The wife could not be presumed to have known that the deed was intended to operate beyond a mortgage, when the expression of that intention was omitted. On her separate examination she acquiesced in the security; but it could not from thence be inferred, that she freely and voluntarily consented to give up her dower absolutely. It did not necessarily follow, that because she assented to relinquish her dower for the further security of a mortgagee, that, therefore, she was willing to lose it for the benefit of a purchaser. On that latter point she was not examined when the acknowledgment of the fine was taken. And it was further observed, that there were no uses declared of the fine beyond the mortgage, and many reasons concurred in confirming the opinion, that even during and subject to the mortgage, the use resulted to the husband subject only to the mortgage. If it had been intended to bar the wife of dower absolutely, the form was obvious; namely, to declare the use in confirmation of the mortgage, and then to the usual uses to prevent dower. This form prevented every objection. On the whole, therefore, it was thought (with great deference to the above-mentioned opinion), that it was highly probable that a bill filed against the purchaser (on whose behalf the title was investigating) by Mrs. P. for redemption, after the decease of her husband (the vendor), would be attended with success."

The form of a mortgage by a husband and wife, so as to prevent the claim of dower and the necessity of a second fine, will be added in the Third Volume. On deeds prepared from the precedents, to be found in 5 Wood's Con. p. 614, 8vo. edit. 4 Newn. Con. 502. and 4 Bar. Pre. 388, 397, 1st edit. it is submitted, that notwithstanding the fine levied in pursuance of the covenants in such drafts of deeds contained, the wife would be entitled to dower; and to bar which, a second fine would be requisite.

In conclusion, it may be useful to apprise the student, that a recovery suffered by the husband, for the further assurance of the mortgagee, wherein the wife is vouched in order to bar her dower, will operate as a bar to dower *pro tanto* only, and not entirely; if it be apparent on the face of the deed leading or declaring the uses of the recovery, that no settlement of the estate beyond the mortgage was intended. See ante, vol. ii. pages 113, 14, in *notis*.

Reference to drafts of deeds in works of eminence where fine would be a partial bar only.

Operation of recovery confined in same manner as fine.

the wife does not pretend she was any ways imposed on; and an answer in this court has been adjudged equal to a fine (E).

Dowress may redeem whole mortgage and hold over for two-thirds (F).

One question, in the case of *Palmer v. Danby* (I), was, whether a dowress had a right to redeem a mortgage [for

(I) *Palmer v. Danby*, Pre. Ch. 137. same case as that of *Mrs. Danby's case*, [S. C. 1 Eq. Ca. Abr. 212, and ante, mentioned in p. 675, ante, note (C).—vol. i. 286, note (S). This is not the Ed.]

Effect of answer in Chancery, and consent in court.

(E) That is, to estopp, the party acknowledging or circumscribing his right, from averring the contrary in time to come. This, it is presumed, is a necessary qualification, to the analogy which is here said to exist between the effect of an answer in Chancery and a fine. Of late, this point does not appear to have occupied the attention of the court—a circumstance which considerably diminishes the general applicability, if not the authority, of the case in the text. An answer in Chancery has been held a sufficient act to sever a joint tenancy in equity, *Frewen v. Rolfe*, 2 Bro. C. C. 224, though not at law, Co. Litt. 184 b, 185 b; and when given in express relation to a power, it has been held such a manifestation of the execution of the power as a court of Equity will substantiate, *Carter v. Carter*, Mose. 365. *Fortescue v. Gregor*, 5 Vea. 553. But that an answer in Chancery is equal to a fine, is a difficult proposition to admit; and seems, indeed, to have been entirely disregarded in *Sedgwick v. Hargrave*, 2 Ves. 56, cited post, 707, 8, where, if the joint answer of the husband and wife had been equal to a fine, the court would not have hesitated in making a personal decree on the wife, which he did; and in the end held, that the wife was not bound by the answer, nothing appearing on the case to warrant the Master of the Rolls in saying, that she was bound. On an answer in a court of Equity, the wife is not always solely and separately examined, and this forms an additional reason against the admission, at least as clear law, of the doctrine in the text. The wife may, indeed, by actual examination and consent in court, dispose of any reversionary interest she may have in personal property, but even that proposition is unsettled, and does not extend to real estate. "It is presumed," says Mr. Roper, (1 Bar. & Fem. 243) "that the principle applicable to correct determinations upon this subject is this,—that when property is so given to the wife, either in remainder or contingency, as that the husband may release it at law as in the instance above supposed; if he assign it for value, the assignment will bind the wife in equity; so that her consent, by way of confirmation and to waive her title to a settlement, ought upon such principle to be received and recorded. But that when the wife's consent is offered to pass her reversionary interest in analogy to a fine at common law, in favor of the husband or of his assignee without a valuable consideration, the court must decline to receive it, because no analogy between the two acts exists, they differing both in forms and principles; and because the property is not assignable at law, and there is no consideration to induce a court of Equity to act or interfere."

Husband's personal estate

(F) Or other proposition, according to the rule laid down in note (M) ante, vol. i. p. 312. But a dowress, like an heir or devisee, has a right to have the

years (g) made before marriage?] And the Lord Keeper declared his opinion to be, that she had, paying her portion of the mortgage money, and to hold over for the rest; and he distinguished this from *Lady Radnor's case*, because there was a satisfied term, and the husband had a power to bar her by assigning it over; but here it was only a mortgage, and against the heir.

So (m), if there be a jointress of lands mortgaged, she, paying the mortgage, shall hold over, till she and her executor shall be repaid, with interest; for as she is entitled to hold the lands discharged from incumbrances, she ought to be reimbursed the money she pays to set her estate free, and in the condition in which it ought to have been.

Jointress may redeem and hold over till paid whole mortgage.

And the law is the same, although the settlement be upon articles only (n). Therefore where the late husband of the plaintiff entered into articles with her, whereby it was agreed, that certain of his lands should be settled before the marriage (which was then intended between them) should be solemnized upon him and her, and the heirs of his body by her. He

Though settlement be by articles merely, whereof mortgage has no notice.

(m) *Bertie v. Stiles*, cited 1 Ch. Ca. further, post, 920, in *notis*. S. L. *Flud* 271. Et vide *Palmer v. Danby*, Pre. v. *Flud*, 2 Freem. 210.—*Ed.*]
Ch. 137. et ante, p. 679, et seq. [See (n) *Haymer v. Haymer*, 2 Vent. 343.

personal estate of her husband, as far as it will extend, applied in discharge of mortgages, and other debts contracted by the husband, which are charges on the land whereof the wife is endowable. And even where the personal estate is insufficient to discharge the debt, it should seem that in some cases, if not in all, she will be entitled to the privilege of having the lands which remain in the hands of the heir charged therewith, in exoneration of the land assigned to her in dower. Thus, it has been said, "if the husband's goods be not sufficient for payment of his debts, the heir must discharge dower of the burthen, &c. for he is the widow's warrant of her dower and ought to follow for her county court, court leet and hundred, &c. that she may see to her house and nurture of her children." *Woman's Lawyer*, 289, cited *Bract*. et vide post, 920, et seq.

must disincumber dower.

(O) That the mortgage was for years, see the observations of Sir Joseph Jekyll on this case in *Banks v. Sutton*, 2 P. Wms. 716, and that the mortgage was made before marriage there can be little doubt, as supposing it made after marriage the wife would clearly be entitled to redeem, no fine or other assurance having been levied or executed, (at least none appears on the report,) to bar her of her dower.

Text corrected.
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died before the settlement made in pursuance thereof, the lands being mortgaged to one who had no notice of the articles. After his decease, the plaintiff exhibited her bill to have them executed: and, although it was objected, that the articles being to make the settlement before marriage, the plaintiff's marrying before it was done, was a waiver of the benefit of them, and (the plaintiff being the sole party with whom they were made) a release in law; yet an execution of the articles was decreed agreed the heir at law of the husband, and also that the plaintiff should redeem and hold for her life, and her executors should detain the land, until the money, that she had lain out upon the redemption, was raised.

Mortgagee having no notice of jointure, may tack money lent after marriage to mortgage made before marriage.

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Where a mortgagee lends more money on his old security (H), without notice of a settlement intervening, he shall be allowed it; for, the legal estate being in him, he may protect himself thereby against a jointress, in like manner as he might against any other person, whose claim had no basis except what was founded on an equity. Thus (o) where tenant in tail demised his lands for ninety-nine years, by way of mortgage, and afterwards married, and, in consideration thereof and of 500*l.* portion, suffered a recovery to enable him to settle a jointure, and then took up more money from the mortgagee upon the former security. The jointress was plaintiff, and the question was, whether the defendant should be allowed the money lent after the recovery and marriage? And the court declared that, if the defendant had no notice of the jointure when he lent the new money, he must be allowed it.

Settlement after marriage not binding on subsequent mortgagee even with notice (I).

And a settlement of mortgaged premises, made after marriage, if *merely voluntary*, is void against a second mortgagee, although he hath notice thereof. Thus (p), where a man who

(o) *Goddard v. Complin*, 1 Ch. Ca. 119.

(p) *Gardiner v. Painter*, Sel. Ca. Ch. 65. [S. C. 1 Sid. 133.—Ed.]

(H) That is, on a mortgage made before marriage.

(I) The settlement being voluntary. The case of *Dolin v. Colman*, ante, 674*a*, n. (c), seems to have been decided on the same principle. As to voluntary settlements, see ante, p. 655, et seq.

had mortgaged his estate, married, and, after marriage, made a settlement of the mortgaged estate upon his wife, which was recited to be in consideration of a portion paid, and *then* mortgaged it a second time; he dying, she brought her bill to be let into her jointure, on payment of one-third of the money due on the first mortgage, without being obliged to redeem the second mortgagee, whom she charged as having had notice of the jointure. It appeared that the second mortgagee had notice of the jointure, at the time of the mortgage; that there was no articles previous to the settlement; and no money was proved to be paid after marriage. And it was decreed, at the Rolls, that she should not be let into her jointure, without redeeming both; which decree was affirmed on appeal to the Chancellor.

A wife, being a creditor by bond given before marriage, shall redeem her husband's estate mortgaged; and the estates being part copyhold will not alter the case. Thus (*q*), where the plaintiff's husband, before marriage, gave her a bond to leave her 1000*l*. if she survived him, and the same day married her, and some years after died intestate, leaving a freehold and copyhold estate, all in mortgage. The plaintiff took out administration, but the personal estate not being near sufficient to pay the bond, she brought her bill against the heir and mortgagee to redeem, and be let in to have satisfaction of her bond. The defendant, the heir, urged, that by the marriage, the bond became void in law, and could not be maintained in equity, especially against him, who was chargeable only, in such case, by being particularly named; and that, although it should be supported as a marriage agreement in writing, yet it could only charge the personal estate, and could not affect the copyhold. *Sed per curiam*: if the bond were executed (which, being doubtful, was ordered to be tried, the court would support it as a bond), and the freehold and copyhold being mortgaged together, the plaintiff should redeem both (*k*).

Wife, creditor by bond before marriage, may redeem mortgage of freehold and copyhold land.

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(*q*) *Acton v. Acton*, Pre. Ch. 237. S. C. 2 Vern. 480.

(*K*) Holt, C. J. expressed himself to the following effect:—"When the wife has any right or duty which by possibility may happen to accrue during

Husband no power over

Jointress of part may redeem whole mortgage,—must contribute,—and keep down interest.

A jointress of part of an estate mortgaged (*r*), is entitled to redeem the whole. But if a jointress after marriage, joins with her husband in a fine, and mortgages the land, and then the husband dies, there her land is charged, and she shall pay her part towards disencumbering of it. And, in that case, her executors shall not hold the land until satisfied thereout; because she herself concurred in the carrying on the charge, and therefore must join in disbursing of it according to the value of her interest, which is estimated at the rate of one-third of the principal; and the jointress, unless she redeem, must keep down the interest (*L*).

Husband lends money in name of himself and wife, wife surviving entitled to whole (M).

If a husband lends out money on mortgage in the name of himself and his wife, and then dies, the wife is entitled to the

(*r*) *Howard v. Harris*, 1 Vern. 33. 2 Ch. Ca. 99. 1 Eq. Ca. Abr. 316, 191. *S. C.* ante, vol. i. 374, nom. pl. 7. [2 Vent. 465. 2 Ch. Rep. 147. *Howell v. Price*, Gilb. Eq. Ca. 106. —Ed.]

wife's bond, if it be not available during coverture.

the marriage, the husband may by release discharge it; but where she has a right or duty which by no possibility can accrue to her during the coverture, there the husband cannot release it." Notwithstanding this, the Chief Justice is said to have differed in opinion with the other Judges, see ante, vol. i. p. 263, n. (E). As a general rule, a bond creditor, before he can redeem, must sue out a judgment at law. See ante, vol. i. pages 261. 263. 281. and 348. But the bond mentioned in the text being in the nature of a marriage agreement, did not, it seems, require this preliminary. The cases to be found in 1 Salk. 325. Com. 67. Carth. 511. Holt, 509. 12 Mod. 288. 1 Ld. Raym. 515. and Lill. Ent. 314, appear to be the same as the one cited in the text.

Text qualified.

(*L*) The present proportions of contribution are explained in a former page and note, see ante, vol. i. p. 312, n. (M). When it is said that the executors of the jointress shall not hold the lands till satisfied thereout, it must be understood as alluding to a complete satisfaction of the whole mortgage; for the debt being the husband's, the greater proportion of it ought to be liquidated out of his assets; and as to that proportion it is clear the executor of the jointress may hold over till satisfied, see ante, 681, in the text, et seq.; and according to note (F) in that page, if the wife could prove that the whole was her husband's debt, and that no part of it was applied to her use, she would, it seems, be entitled to be exonerated of the entire mortgage out of her husband's assets, notwithstanding she concurred in operating her portion of the estate by means of the fine. Et vide further, as to the payment of interest, post, 920, et seq. in notis.

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Advancement.

(*M*) This, on the principle of advancement, it being considered that when a husband affects a purchase in the name of his wife, he does it for the purpose of making a provision for her, which he is morally, legally, and equitably

survivorship, if there are assets sufficient to pay the debts without this money; for, in this case, the wife is in the nature of a joint purchaser. Thus, where G.'s personal estate was decreed to be applied to the payment of debts and legacies in ease of his real estate, which by his will was made liable thereto (s); and his widow and executrix, now the wife of the defendant B., upon the account before the Master, insisted, that several mortgages and bonds for money lent by her husband, being taken in the name of the husband and wife, she was entitled thereto as survivor, and that the same ought not to be brought into the account as part of the personal estate: the Master having stated that matter specially, it was insisted for the heirs, that the wife was but in nature of a trustee, the money being the husband's, which if paid in the life-time of the husband, would have fallen into his personal estate again, and he would not have been accountable to the wife; and that if this should not be liable to debts, the husband, by joining his wife in the security, might defraud all his creditors: but the court decreed in favor of the defendant, against the heir at law.

(s) *Christ's Hospital v. Budgin*, 2 Vern. 683.

bound to do, according to Sir J. Jekyll, in *Banks v. Sutton*, 2 P. Wms. 703. Besides, a wife cannot be a trustee for her husband (except perhaps by express declaration), which rebuts the presumption of a resulting trust in the husband's favor. See *Kingdon v. Bridges*, 2 Vern. 67. The purchase however in this case is voluntary; and therefore its effect against creditors is noticed by the learned author in the next paragraph of the text. That a purchase by a husband in the name of his wife will not be considered as raising an implied trust for him, but that it will be taken as a beneficial purchase for the wife, see, in addition to the cases cited, *Back v. Andrews*, 2 Vern. 67. S. C. Pre. Ch. 1. post, 736. *Smith v. Baker*, 1 Atk. 385. *Glaister v. Haver*, 8 Ves. 199. and *Rider v. Kidder*, 10 ibid. 367; and note, if a copyhold be purchased by the husband in the joint names of himself and his wife, they will both and each be tenants of the *entirety*, so that the husband cannot alien or devise the estate to the prejudice of the wife's right of survivorship. *Green v. King*, 2 W. Bla. 1211. *Back v. Andrews*, *ubi supra*; and *Purefoy v. Rogers*, 2 Lev. 39. As to what purchases shall be considered advancements to children and other relations, see *Rumboll v. Rumboll*, 2 Cox, 96, cited S. C. 2 Eden, 15, and cases cited in Mr. Eden's n. (a), p. 17. *Rancliffe v. Parkyn*, 6 Dow P. R. 200. *Morless v. Franklin*, 1 Swanst. 13. 2 Fonb. Trea. Eq. 121, 5th edit. 1 Watk. Cop. 214. 2 Madd. Ch. 116, 2d edit. 2 Rob. Wills, 3. 127. 1 Scriv. Cop. 465, 2d edit. and Sug. Ven. & Pur. Chap. XV.

Not against
creditors.

But in the case of creditors (t), the husband and wife being joined in the security, would not avail *her* against them (n).

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Formerly held
that term bar-
red dower in
favor of heir,
devisee, and
purchaser.

It was held, in the case of *Brown v. Gibbs* (u), that a trust-term should not be removed out of the way of a dowress, even to let her claim in against an heir at law; and this determination was confirmed upon the first hearing of the case of *Wray v. Williams* (x) (o), wherein this point came again under consideration, upon a claim set up by a dowress against the devisee of her husband, who defended himself by a trust term, created originally to defend a purchaser. The resolutions in both these cases were founded upon the determination in *Lady*

(t) *Galley v. Quarrel*, cited in the last case.

(u) Pre. Ch. 97. Mich. 1699. [S. C. 2 Freem. 233.—Ed.]

(x) Pre. Ch. 151. S. C. 1 P. Wms. 137. 28th June, 1700.

Contra; if be-
fore marriage,
and as against
what creditors.

(N) Because, as to the wife the purchase in her name would be voluntary and fraudulent against creditors. On the same principle the decision in *Stileman v. Ashdown*, 2 Atk. 477. 481, seems to have proceeded. See also *Fletcher v. Sedley*, 2 Vern. 490, and Mr. Raithby's note (1), where the cases on this head are collected. But an advancement in favor of a child will be good against creditors, 1 Watk. Cop. 324; and if the mortgage had been made in the name of the husband and intended wife before marriage, it would then have been available to her against creditors, Gilb. U. p. 47; and it seems that the husband must be proved to have been indebted, at the time of the settlement, to the extent of insolvency, in order to invalidate the settlement. *Christ's Hospital v. Budgen*, 2 Vern. 683. It has however been strenuously argued, that a purchase is not within the operation of the act of 13 Eliz.; for as the purchaser may give the money to the object of his bounty to purchase the estate for himself, he may by the same reason direct a conveyance to be made to him, see Ath. on Sett. Chap. V.; and this, says Mr. Sugden (V. & P. 542, 5th edit.) seems to be the better opinion, where the case is clear of actual fraud, citing *Fletcher v. Sedley*, ubi supra. *Procter v. Warren*, Sel. Ca. Ch. 78, and 8 Ves. 199. With respect to purchases made in the name of a wife or child, by persons who afterwards become bankrupts, it is necessary not only that they should not be indebted, but also that they should not be in trade at the time of making the purchase. See *Glaisler v. Hewer*, 8 Ves. 195. S. C. 9 ibid. 12. 11 ibid. 377.

*Wray v. Wil-
liams reversed.*

(O) This case was first heard before Lord Keeper Wright, who declared that Lady Williams was not entitled to dower of the lands in question, there being a trust term subsisting in them prior to the marriage. Pre. Ch. 151. On a bill of review ten years afterwards, Lord Harcourt reversed Lord Keeper Wright's decree, and ordered that the plaintiff (*Lady Williams*), having recovered dower at law, this trust-term that Sir B. Wray, the heir, had set up, should not stand in her way in equity. 1 P. Wms. 139.

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Radnor's case (y), which was very different in its circumstances; that being the case of a purchaser for valuable consideration of an estate, whereof there was a term for ninety-nine years standing out, created for the performance of several trusts, and afterwards to attend the inheritance; by assigning over of which, the husband had a power to bar his wife of dower; and which step he *had* taken to secure the purchaser.

But the injustice of these decisions in favor of the heir at law and devisee (the latter of whom was a mere volunteer) against a dowress, whose title is particularly favored in law (especially where the contrary was held respecting a jointress, who was considered as a purchaser) could not long escape the observation of the court; more especially, as they were made expressly upon the authority of a case, the circumstances of which were totally different. Accordingly, this doctrine was revised, and the contrary determined in a series of decisions.

Contra now as to heir and devisee.

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Thus, in the case of *Hitchin v. Hitchin* (x), where H., the plaintiff's grandfather, made a mortgage for 500 years (which was satisfied, and after his death, assigned to S. his relict, who was entitled to dower of his estate) and then died, leaving the plaintiff's father his son and heir; who being indebted, made his will, and thereby devised lands to his wife L., who did not mention the devise to be in satisfaction of her dower, and devised the residue of his estates unto his executors until his debts paid. L. brought her writ of dower and recovered; then the heir brought his bill to be relieved against the recovery, and she brought her bill for a discovery and to set the term out of the way; and it was decreed, that the dowress should be relieved against a satisfied mortgage term.

Dowress relieved against satisfied mortgage term, as between herself and heir.

(y) Pre. Ch. 65. Mich. 1694. S. C. 1 Vern. 356. 2 Ch. Ca. 172, and in Eq. Ca. Abr. 219, by the name of *Bodmin v. Vandebendy*, S. C. Show. Parl. Ca. 68. et vide *Hill v. Adams*, 2 Atk. 208; [and Butl. Co. Litt. 208 a. note (1), where the judgment of Lord Hardwicke is fully given. This

case of *Hill v. Adams* is also reported in Amb. 6, and 2 Freem. 211, sub nomine *Swannock v. Lyfford*.—Ed.]

(z) Pre. Ch. 133. Mich. 1700. S. C. 2 Vern. 403. [S. C. 2 Freem. 241, and 1 Eq. Ca. Abr. 218, pl. 18, which seems to be the same case, but differently stated.—Ed.]

Satisfied and unsatisfied term distinguished as to dower.

The case (a) of a satisfied or unsatisfied mortgage term, seems to differ only in this; that in the one, the court gives the dowress relief absolutely, in the other, upon terms of keeping down a third of the interest, or paying a third of the principal: but as to the mortgagee, the dowress must pay the whole money, and hold over for the residue.

Dowress recovering at law, term removed in equity.

This latter resolution, as to trust terms, was farther settled, upon a bill of review brought upon the case of *Williams v. Wray* (b), in which Lord Keeper Wright's decree was reversed; and also in the case of *Higford v. Higford*; both of which resolutions were made by Lord Keeper Harcourt, and firmly established the law, that *a dowress having recovered at law, a trust term set up should not stand in her way in equity.*

As against heir.

So in the case of *Dudley v. Dudley* (c), it was held, that a trust term, attending upon the inheritance, should be removed in favor of a dowress against an heir at law (P).

(a) *Banks v. Sutton*, 2 P. Wms. 1710. Sed vide 2 P. Wms. 707, where this case is said to have been determined in Easter Term, 1711.

(b) *Williams v. Wray*, 1 P. Wms. 137. Hil. 1710. *Higford v. Higford*, (c) Pre. Ch. 241. S. C. 1 Eq. Ca. 1 Eq. Ca. Abr. 219, pl. 5. Easter, Abr. 219, pl. 5. Easter, 1711.

Term removed in favor of dowress, when.

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(P) As against an heir at law, devisee, or volunteer, an attendant term will be removed out of the way of the dowress, that is, she will be entitled to dower as against those persons, notwithstanding the term. *Mitchell v. Reynolds*, Butl. Co. Litt. 208 a, latter end of note there. But as against a purchaser for valuable consideration, who has obtained an actual assignment of the term to his own trustee, the widow will have no effectual remedy, and she must lose her dower. Ibid. et vide ante, vol. i. 483, in notis, where this subject is considerably enlarged on. The principles on which this protective doctrine of attendant terms is founded may be thus shortly explained :—

At law, term virtually deprives widow of dower.

By the rules of the common law it is customary, in giving judgment on a writ of dower, to except the interest of the termor, if it appears to the court that the term was created prior to the title of dower. This is effected either by giving judgment *specialty*, that the demandant shall recover seisin of the reversion, upon which a writ of *hab. fac. seisin* is awarded to the sheriff, with a proviso *quod ten. ad termin. annor. non expellatur*; or by giving judgment *generally*, with a *cesset executio* during the term. *Bodmyn v. Child*, Com. Rep. 185. *Wheatley v. Best*, Noy, 65. S. C. Cro. Jac. 564. The former mode is adopted where there is any rent reserved upon the lease for years, in order

But a wife is not entitled to dower (*d*), out of the equity of redemption of a mortgage in fee.

No dower of equity of redemption of mortgage in fee.

(*d*) 1 Atk. 606. 3 P. Wms. 234, 5. [et vide post, 699, et seq.—Ed.]

to enable the dowress, as the reversioner, to obtain the benefit of the rent; and although the rent reserved be but a pepper-corn, it seems that the dowress will be entitled to an immediate execution. See *Pheasant v. Pheasant*, 3 Ch. Rep. 69. *Tiffin v. Tiffin*, 2 Freem. 66. *Anon. Owen*, 32, pl. 2. *Portington v. Beaumont*, Winch. 79. *Foljam's case*, Godb. 165. 1 Roll. 678, and *Stoughton v. Leigh*, 1 Taunt. 403. If, however, there be no rent payable in respect of the term, as if lands are limited or devised to one for years, with remainder to another in fee, or on a common demise with no clause of reservation, execution will be stayed during the continuance of the term, as no benefit could arise to the dowress from her obtaining seisin. Perk. s. 335, and see *Brown v. Gibbs*, Pre. Ch. 97. 2 Freem. 233. Godb. 165. Judgment then being given merely of the reversion and rent, with an immediate execution, if there be any rent reserved on the term; or of the reversion along with a *cassat executio* during the term, if there be no rent reserved thereon, it is apparent that the widow to all purposes of benefit, will at law be deprived of her dower.

A court of equity, however, regards the purpose for which the term was created, and views the extent to which the owner of the reversion is interested therein. It declares, that when the trust or purpose of the term is satisfied, the ownership of the term shall belong in equity to the owner of the freehold and inheritance, whether it be declared by the original conveyance to attend the inheritance or not; that the trustee shall hold the term for the benefit of the proprietor of the fee; and that the term shall be considered as part of the inheritance, yet not merged, but so attendant upon the fee as to follow and accompany it, and every right and interest growing out of it, either by operation of law, or by the agreement of the parties. In a late case, the Master of the Rolls said, "Every description of ownership shall, in its order, degree, and proportion, have a use in the term commensurate with the interest existing in the inheritance." *Maudrell v. Maudrell*, 7 Ves. 578. When therefore dower arises, the term in a proportion is just as much attendant on that interest growing out of the inheritance, as before it was attendant on the inheritance during the husband's life; consequently the heir, devisee, or volunteer, although he can avail himself of the term at law, yet he will not be permitted in equity to defeat by it the widow's claim to dower; for she having a certain quality of interest in the inheritance as well as such heir, devisee, or volunteer, a court of equity will consider her to have a corresponding interest in the term. Hence then arises the widow's equity against her husband's heir, devisee, and volunteer.

Contra in equity against heir, devisee, and volunteer.

In *Squire v. Compton*, 9 Vin. Abr. 227, pl. 60. S. C. 2 Eq. Ca. Abr. 387, pl. 7, it was made a question whether the assignees under a commission of bankrupt could, by taking an assignment of a mortgage term prior to the title of dower protect their estate from the wife's claim? It was insisted, that creditors and assignees of commissioners of bankrupt stood only in the place

As also against assignee in bankruptcy.

This distinction (e) between a mortgage in fee and a mortgage for a term of years, appears to have taken its rise from

(e) *Vide Godwin v. Winsmore*, 2 Atk. 526.

of the bankrupt, and since such an assignment to the bankrupt himself or his heir would not protect the estate from a title of dower in the hands of the heir, neither would it protect the estate in the hands of the creditors of the bankrupt, or in the hands of the assignee of the commissioners; and that this varied the present case from the case of *Lady Radnor v. Vandebendy*, in Dom. Proc. where it was held, that such a prior term should protect the estate from dower in the hands of a purchaser. The decree was, that the widow should be let into her dower,—keeping down the interest of a third part of the mortgage [that is, a third part of the interest of the whole mortgage, see post, p. 922, 3, 4.]

But not against mortgagee and purchaser, when.

That same principle that extends to deprive the husband's heir, devisee, volunteer, and assignee of bankrupt of the benefit of the term, applies equally against a purchaser who stands precisely in the husband's place. The term accompanies the freehold and inheritance in the mode and manner in which it was attendant upon the same *before* the inheritance was conveyed. If, therefore, a purchaser merely take a conveyance of the freehold and inheritance, the vendor's widow will be entitled to dower notwithstanding the term; for *that* was her equity as against her husband, and the conveyance of the reversion merely, cannot alter that equity in favor of a purchaser. If, however, the purchaser procure an actual assignment of the term to a trustee of his own nomination, it has been settled, that such assignment will protect him against the title of the widow, although he have notice of the dower previously to his purchase. See *Maundrell v. Maundrell*, 10 Ves. 272. *S. C.* 7 Ves. 567. And it is observable that a mortgagee is a purchaser within the scope of this rule. If, therefore, he procure the assignment of an outstanding satisfied term, it will protect his security from the dower of the mortgagor's widow. *Wynn v. Williams*, 5 Ves. 130. *Mole v. Smith*, ante, vol. i. 484, still standing for judgment. Indeed, for all purposes of security to a mortgagee, the term is in practice usually relied on as a sufficient protection against the dower, though as to a purchaser it has been already noticed that a fine is in many instances required. See ante, vol. i. 433, 484, *in notis*. The uniform opinion of the profession is, that the term must be *actually assigned* to a trustee for the purchaser, if it be intended to be used as a bar to the wife's dower. See Sug. V. & P. 378, 5th edit. And Lord Eldon has said, that such assignment must be “in the very transaction” of the purchase or mortgage, which seems to imply that it will be unavailable if taken *after* the purchase or mortgage has been completed. See ante, vol. i. 483, *in notis*. Mr. Belt deduces this conclusion from *Maundrell v. Maundrell*, *ubi supra*, as a settled principle, namely, “that a purchaser, to avail himself of an outstanding term, must have procured an assignment of it, or a declaration of trust, or have obtained possession of the deed which created it.” 1 Bro. C. C. 326, n. (1), Belt's edition. So much of this passage as is in italics must, as a general rule, be denied to be law.

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the equity of redemption of the former having been considered as analogous to a *pure* trust; of which it was formerly,

The term we have been speaking of is a satisfied term, and it should be remembered that the preceding observations are applicable to a satisfied term only, but the period when the term becomes satisfied and attendant, whether before or after marriage, is immaterial,—that it be created before marriage is all that is requisite. If the term be created after marriage, the mortgage will be subject to the dower and not the dower to the mortgage, unless indeed the wife shall have debarred herself of dower by joining in a fine or recovery, and then only to the extent of the charge or incumbrance created by such assurance, as stated in a preceding note, see ante, 677, 8, n. (D). If a mortgage for years executed before marriage, be still subsisting at the husband's death, then in the event of a pepper-corn rent having been reserved on the term, the widow, we have seen, will have judgment for a third part of the reversion and a third part of this rent as incident thereto, which being an immediate interest in the premises though a minute and barely appreciable one, will entitle her to redeem the whole mortgage, and to proceed against the heir or reversioner for contribution. If the termor be not in possession, she will be entitled to enter on the premises and receive the rents and profits subject to the charge. She will likewise be entitled to have the land exonerated out of the husband's personal estate, as mentioned in a former note, see ante, 681, n. (F). If the term have no rent reserved upon it, as is frequently, indeed generally the case in wills and marriage settlements, (where the term is raised for the purpose of portioning or otherwise), it should seem to follow from the preceding observations, that since no rent is reserved, judgment can be given of a third part of the reversion only, with a stay of execution during the term, and consequently that the wife having no present interest in the term cannot redeem. But we have seen that a remainder-man or reversioner may redeem, ante, vol. i. 312, n. (L); and it is observable, that in *Dudley v. Dudley*, ante, 687 a, in the text, where the wife of a tenant in tail recovered dower at law with a *cesset executio* during the term, it was decreed in equity, that the dowress should have the benefit of the trusts of the term, as to a third part of the profits above the charge of the annuities, and that the trustees should account to her for the third part accordingly from the death of her husband, and from time to time for the future rents and profits during the term, and that the term should stand charged therewith during her life. Indeed a distinction never appears to have been drawn as to equitable relief, between the case of a dowress who has had execution of her judgment at law, and so become to all intents and purposes tenant for life of the reversion, and entitled to be let into possession as against the trustee of the term, and the case of a dowress who has recovered judgment with a stay of execution, and who consequently cannot entitle herself even to the ownership of the reversion; although it might certainly have been open to contend that the cases afforded a distinction, since in the former instance the dowress merely comes into equity to have the trust executed for her benefit, as the complete owner *pro tempore* of the reversion, by virtue of her recovery at law; while in the latter case, she comes to have a title made good in equity, which is not available at law.

If term not satisfied, widow can obtain dower by redeeming.

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and is now generally understood, dower cannot be; as well because, in such case, there is no seisin by the husband,

during the existence of the term, or, as it hath been expressed, to be relieved against that very judgment upon which she founds her title. See *Park. on Dow.* 365.

Whether covenant against incumbrances sufficient indemnity against damages and costs in writ of dower.

The tenant cannot plead a prior term of years in bar to an action on a writ of dower, for it is in fact no bar, but he may plead it in delay of execution and to save himself the damages, if no rent be reserved on the term; or if such rent be reserved, he may pray that the demandant be endowed of the reversion and the rent. See *Booth v. Lindsey*, 2 *Ld. Raym.* 1294. *Anonymous*, 2 *Mod.* 18. *Villers v. Hanley*, 2 *Serj. Wils.* 49. If damages are obtained upon a verdict in such an action, the statute of Gloucester (6 *Edw. 1. c. 1. sec. 2*), gives the demandant costs; but if no damages are given, the demandant, although she obtain judgment for her dower, must pay her own costs. Lord Hardwicke has said, that the covenant against incumbrances generally introduced in mortgage and purchase deeds, will indemnify the purchaser or mortgagee against such damages and costs. *Swannock v. Lyfford*, *Butl. Co. Litt.* 208, a. n. (1). But, as remarked in a preceding page, (see ante, vol. i. 483, in *notis*), a purchaser may fairly require an adequate indemnity against the costs of any suit instituted by the widow to recover dower, and it will be for him to consider whether the vendor's own covenant against incumbrances generally, will afford that ample security which is required. Lord Eldon, in *Innes v. Jackson*, 16 *Ves.* 366, thus expresses himself of a covenant for further assurance. "The covenant for further assurance does in terms amount to an agreement to levy a fine, just as if it had been so expressed; and if the mortgagee's title would not have been good without a fine, I apprehend an action might have been maintained by him upon that covenant; or, upon the principle of a certain class of cases, [see post, 707, 8] perhaps this court would have decreed the husband to procure his wife to join in levying a fine."

Repertorium of cases.

The cases on the subject of this note are numerous. The following are the principal, in addition to those mentioned in the text: *Snell v. Clay*, 2 *Vern.* 524. *Hamilton v. Mohun*, 1 *P. Wms.* 118. *Squire v. Compton*, 9 *Vin. Abr.* 227, pl. 6. *S. C.* 4 *Eq. Ca. Abr.* 387, pl. 7. *Dormer v. Fortescue*, 3 *Atk.* 131. *Mitchell v. Reynolds*, *Butl. Co. Litt.* 208 a. latter end of n. (1). *S. C.* 1 *Atk.* 604. *Wynn v. Williams*, 5 *Ves.* 130. *Maundrell v. Maundrell*, 7 *Ves.* 567. *S. C.* affirmed on appeal, 10 *Ves.* 246. *Simpson v. Gutteridge*, 1 *Madd. Rep.* 618. And see further ante, vol. i. 483, n. (A). sec. iii. 3. *Altham v. Angleary*, *Gilb. Eq. Ca.* 16. *S. C.* 1 *Stra.* 12. *Doug.* 25, and *Lampet's case*, 10 *Co.* 49 b.

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Corollary:—widow in every case entitled to dower of equity of redemption on mortgage for years.

As a corollary it may be remarked, that from the preceding observations it should seem to follow, that in every case of a mortgage for years, whether before or after marriage or whether the mortgage be satisfied or not, the widow by a circuity will become entitled to a beneficial estate in dower, except in the instance of a purchaser procuring an actual assignment of a satisfied term, created previously to the marriage to attend the inheritance; and the case of a purchaser buying subject to a mortgage for years, and paying off the money during the life of the vendor, and taking an assignment of the

which, at law, is necessary to consummate the title of dower in the wife, as that, by the preamble to the statute of uses, it was recited, that, by means of uses, the wife was defeated of her dower, from whence it appeared, that the wife of *cestui que use* was not dowable at common law; and if so, then the conclusion necessarily followed, that as an use at common law was the same as a trust since the statute, the wife could no more be endowed of a trust since the statute, than at common law, and before the statute, she could of an use. And as the analogy to uses had great weight, originally, in establishing this rule as to trust estates, so the common practice of conveyancers, founded thereupon, in placing the legal estate in trustees in order to prevent dower, (which made the letting in that claim upon trusts contrary to former opinions, of dangerous consequence to old titles) rendered the courts of law very jealous of breaking in upon this rule; it having been thought safer to abide strictly by the rule of law, *even* in cases where the reason of it did not apply, *than* to shake the foundation of ancient titles, by permitting nice and curious exceptions to be made to the general rule.

Therefore, although this rule of law, as to a dowress claiming dower out of the equity of redemption of a mortgage in fee, was attempted to be broke through in the case of *Banks v. Sutton* (f), (in which case, this doctrine was gone into by Sir Joseph Jekyll, Master of the Rolls, in a learned and elaborate argument, and it was resolved, that a woman was entitled to dower out of the equity of redemption of a mortgage in fee) yet in a later case, in which this question came before the Lords Commissioners of the great seal, that decision of Sir Joseph Jekyll was over-ruled, and the resolution in the case of *Banks v. Sutton*, as to this point, taken *as a general position*, held not to be law (q).

Banks v. Sutton, (wherein the contrary was held) over-ruled.) See also *post*, 699 *et seq.*

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(f) 2 P. Wms. 700. Vide 3 *ibid.* 232, n. (B).

term to a trustee of his own nomination to attend the inheritance, must, it is conceived, be considered as included within the spirit and meaning of this exception.

(Q) It may not, however, be amiss just to advert to the leading features of his Honor's judgment in that case, notwithstanding it has been over-ruled. "All kinds of dower," observed Sir Joseph Jekyll, "were instituted for the Dower a moral, legal, and equitable right."

subsistence of the wife during her life; which right of dower is not only a legal but a moral right. The relation of husband and wife as it is the nearest, so is it the earliest, and therefore the wife is the proper object of the care and kindness of the husband; the husband is bound by the law of God and man to provide for her during his life, and after his death, the *moral obligation* is not at an end, but he ought to take care of her provision during her own life. This is the more reasonable, as during the coverture, the wife can acquire no property of her own; if before her marriage she had a real estate, this by the coverture ceases to be her's, and the right thereto, whilst she is married, vests in the husband; her personal estate becomes his absolutely, or at least is subject to his controul; so that unless she has a real estate of her own (which is the case but of few,) she may by his death be destitute of the necessaries of life, unless provided for out of his estate by a jointure or dower. As to the husband's personal estate, unless restrained by special custom (which very rarely takes place), he may give it all away from her: so that his real estate (if he had any), is the only *plank* she can lay hold of, to prevent her sinking under distress. Thus is the wife said to have a moral right to dower. Dower also is a *legal right* created by law; which settles the quality of the estate out of which the wife's dower arises, and likewise ascertains the *quantum* thereof. Dower is also an *equitable right*, and such a one as is a foundation for relief in a court of equity: it arises from a contract made upon a valuable consideration; marriage being in its nature a civil, and in its celebration, a sacred contract; and the obligation is a consideration moving from each of the contracting parties to the other; from this obligation arises an equity to the wife, in several cases, without any previous agreement; as to make good a defective execution of a power, a defective conveyance, or supply the defect of a surrender of a copyhold estate; in all which the court relieves the wife, and makes a provision for her, where it is not unreasonable or injurious with respect to others." Sir Joseph Jekyll then went into an elaborate review of the cases which bore directly or indirectly on the point before him, and concluded by declaring, that he did not know, nor could find any instance, where dower of an equity of redemption was controverted and adjudged against the dowress, and as there were authorities in cases less favorable, therefore he declared, that the plaintiff being the widow of the person entitled to the equity of redemption of the mortgage in question, (being a mortgage in fee) she had a right to redeem. See 2 P. Wms. 718, 19.

Marriage a good consideration.

Distinction in dower between trust created by husband, and trust created by his ancestor, disregarded.

In the above case, Sir Joseph Jekyll seemed strongly inclined to take a distinction between a trust created by the husband himself, of which he admitted a woman was not endowable, and a trust created by another person. "That the wife shall not have dower of a trust created by the husband," he remarked, "or (which is all one), of a purchase made by him in a trustee's name, may be reasonable, since it may be presumed to be done with intent to bar dower, and every man may do as he pleases with his own. Accordingly, it has been commonly practised for a purchaser to take a conveyance in his own name and in the name of another person, as trustee, purposely to prevent dower." But, "I would not take it-upon myself to determine, whether a wife shall have dower out of a trust of the inheritance, where it is created, not by the husband, but by some other person, and no time limited for conveying the legal estate; when that comes to be the case, it will be time enough

The case I allude to, was that of *Dixon* widow of *Abraham* *Dixon* *v. Sir George Saville* and others (g), which came on *Saville* stated.

(g) *Dixon v. Saville*, 7th November, 1785. [S. C. shortly stated 1 Bro. C. C. 325.—Ed.]

to determine it." See 2 P. Wms. 709. 715. Lord Talbot decided the case of *Attorney-General v. Scott*, Ca. temp. Talb. 138. (S. C. Sug. V. & P. Append. No. xvii. p. 33, 5th edit.) without any regard to this distinction, and Lord Hardwicke in *Goodwin v. Winsmore*, 2 Atk. 525, said, a distinction was taken by Sir Joseph Jekyll in *Banks v. Sutton*, 2 P. Wms. 707. 709, in regard to a trust, where it descends or comes to the husband from another, and is not created by himself; but Lord Hardwicke thought there was no ground for such a distinction, for it was going on suppositions which held on both sides; and, at the latter end of the report, Sir Joseph Jekyll seemed to be very diffident of it himself and rested chiefly on another point of equity, so that it was no authority in point. But his Lordship added, "there is a late authority in direct contradiction to the distinction above taken in *Banks v. Sutton*, [namely], the case of the *Attorney-General v. Scott*," (ubi supra). So also in *Burgess v. Wheate*, Sir Thomas Clarke remarked, that the distinction made by Sir Joseph Jekyll was founded on too precarious a reasoning to go upon. The husband, he observed, found the estate subject to the trust created by the ancestor: who could say that he intended the wife to be dowable? Who could say, that if he had not found the estate under a trust, he might not have created such a trust. 1 Wm. Bl. 138, and see *ibid.* 161. S. C. 1 Eden Rep. 224. On the authority of these observations, we may venture to affirm, that the distinction alluded to by Sir Joseph Jekyll is without foundation.

His Honor also adverted to the distinction which has inexplicably crept in respecting dower and curtesy of an equity of redemption—the former being denied, and the latter allowed. He said he could not but wonder how it came to be thought, that a tenant by the curtesy was entitled to relief in equity more, or farther, than a dowress, and particularly, that a tenancy by the curtesy might be of a trust estate, but not dower; which was no less than a direct opposition to the rule and reason of the law allowing dower of a seisin in law, but not a tenant by the curtesy, because the wife could not gain an actual seisin, but the husband might; which reason held in a trust-estate, for the wife could not gain or compel a trustee to convey the legal estate to the husband, but the husband himself might; therefore if any distinction was to be made, dower (it seemed to his Honor) ought to have been preferred to curtesy. 2 P. Wms. 705. Lord Redesdale, in a late case, has well stated the only ground on which this anomalous distinction can be reconciled. The difficulty, he observes, in which the courts of equity have been involved, with respect to dower, originally arose thus:—They had assumed, as a principle, in acting upon trusts, to follow the law; and according to this principle, they ought in all cases where rights had attached on legal estates, to have attached the same rights upon trusts; and consequently to have given dower of an equitable estate. It was found, however, that in case of dower, this principle, if pursued to the utmost, would affect the titles to a large proportion of the

Origin of distinction as to denying dower, and allowing curtesy of a trust.

*Dixon
v.
Saville.*

to be heard upon bill and answer, the 7th of November, 1783. The circumstances were as follows: Abraham Dixon, being in his life-time and at his death, seised in fee of estates in the county of Northumberland, of the yearly value of 3000*l.* and upwards, died in 1782, without issue, leaving Anne Dixon, the plaintiff, his widow. Abraham Dixon, by his will, dated 3d January, in the same year, devised his real estates, &c. to the defendants, Sir George Saville, and William Orde and Thomas Adams, their heirs and assigns, upon trusts in his will mentioned, and subject thereto, to his great nephew Arthur Onslow, his heirs and assigns, for ever.

Bill.

The testator not having in his life-time, made any settlement or other provision for his wife, in lieu or bar of dower; she, not having done any act to bar herself thereof, filed her bill against the trustees, stating the above facts, claiming dower out of all the testator's real estate, and praying to be

estates in the country; for that parties had been acting, on the footing of dower, upon a contrary principle, and had supposed that by the creation of a trust, the right of dower would be prevented from attaching. Many persons had purchased under this idea: and the country would have been thrown into the utmost confusion, if courts of equity had followed their general rule, with respect to trusts in cases of dower. But the same objection did not apply to a tenancy by the curtesy; for no person would purchase an estate subject to curtesy, without the concurrence of the person in whom that right was vested. This, Lord Redesdale took to be the true reason of the distinction between dower and curtesy. It was necessary for the security of purchasers, of mortgagees, and of other persons taking the legal estate, to depart from the general principle in the case of dower; but it was not necessary in the case of a tenancy by the curtesy. *Darcy v. Blake*, 2 Sch. & Lef. 388.

*Sacrifice of
principle, was
in allowing cur-
tesy, not in de-
nying dower.*

It has always been considered that the decision against the dowress proceeded on a wrong principle. Even the Judges themselves, who pronounced the decree, thought it would not admit of much discussion. Mr. Park, on this subject, very elegantly remarks:—"Upon an attentive perusal of the cases, it will be found, that after much hesitation, whether to prefer consistency of principle, or security of titles; the latter motive at length gained the ascendancy, the existence of an anomalous distinction being regarded as of less importance than the extensive mischief which would have been produced by disregarding a practice which had been applied to perhaps half the titles in the kingdom." See Park on Dow. 126. But it may fairly admit of a question, whether curtesy ought to have been allowed of a trust estate or equity of redemption; and if so, there will be no dereliction of principle in refusing dower to the widow. If it be literally true that trusts are now what uses were

let into the receipt of one-third part of the rents and profits thereof.

Dixon
v.
Saville.

To this bill, the trustees and infant put in their answer, *Answer.* setting forth, that the testator, being seised of these premises, had borrowed a large sum of money upon mortgage, and for securing the re-payment thereof with interest, had, previous to his marriage with the plaintiff, conveyed the premises unto the mortgagee *in fee*, subject to a proviso for redemption, on re-payment of the money with interest; that (the legal estate in the premises being by this mortgage absolutely vested in the mortgagee, previous to and at the time of the intermarriage of the testator with the plaintiff, and not being at any time afterwards re-conveyed to him, but remaining vested in the mortgagee at the time of his death, and he being therefore only entitled to the equity of redemption thereof at the time of his intermarriage, and at all times thereafter, until

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formerly, it should be inquired how uses stood in regard to dower and curtesy before the statute of Hen. 8. Perkins (who wrote before the statute of uses) says, "there shall be no dower of an use," s. 349; but to shew that he took it, a tenant by the curtesy stood upon the same footing as a tenant in dower, he says "*and there shall be no tenant by the curtesy of an use,*" s. 457. Consequently there ought not at present to be a tenancy by the curtesy of a trust. In allowing curtesy therefore consisted the sacrifice of principle, and not in denying dower. These, however, are speculative remarks, as no doctrines in law or equity are now more permanently settled than that a husband shall have his curtesy of a trust, while a wife shall be debarred of a dower. Lord Hardwicke expressed an opinion, that if any innovation were to be made, the nearest way to right would be to let in the wife to dower of a trust estate, and not to exclude the husband from being tenant by the curtesy of it. See the latter end of his judgment in *Casbourne v. Scarfe*, 1 Atk. 606.

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continued.

Mr. Watkins, in his usual caustic dissatisfied style of writing, remarks:—*Act of parliament only means of endowing wife of a trust.* "But in the name of wonder, if the matter be wrong, why not set it right? If dower be a moral claim, and the favorite of equity, why should equity suffer some hasty precedents to come in its way. If an error has been made, can it be any reason why we should continue blundering to our lives end? If the point be only questionable, let us meet it manfully, rather than warily shrink from a discussion. If the matter be grown too inveterate for the courts to interfere, yet, surely, if it be merely for the honor of the laws, and to preserve the appearance of consistency in our decisions, (to say nothing of the morality of the thing), some other aid should be had recourse to." 2 Watk. Cop. 82. It is clear that the law in this particular could not be altered now without a legislative provision for that purpose.

*Dixon
v.
Saville.*

the time of his death) the plaintiff was not at any time dowerable in or out of the said premises, or any part thereof; nor was entitled to claim, either at law or in equity, any dower or thirds therein.

Hearing.

On the hearing, the plaintiff could have proved by witnesses, that the testator, her husband, understood and declared (A) that after his death his widow would be entitled to dower out of his real estates; and that he made his will under that idea, could have been proved, if relevant, by the person who drew it, Mr. Dixon having put the question to him, whether Mrs. Dixon would not be entitled to her dower, to which he, being at the time ignorant of the mortgage, answered, that she certainly would. Indeed the will itself sufficiently spoke the idea; for Dixon thereby bequeathed to the plaintiff, by the name of his dear wife Anne Dixon, his coach and harness and a pair of horses, together with as much of his plate as she should think proper, not exceeding the sum of 60*l*.; which things she could have no occasion for, if she had not a jointure to support her.

If the question was lost Mrs. Dixon was left totally destitute of any provision.

*Arguments in
favor of widow.*

The claim of the widow was supported on three grounds. First, the general law. Secondly, the distinction between a mere trust and an equity of redemption; and, Thirdly, the authorities in favor of dower under circumstances not more favorable than in those attending this case.

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*Widow not en-
dowable of a
pure trust.*

Under the first of these heads, it was observed, that dower was a right of the first attention and most sacred preservation at the common law, it was a right not only founded in our law, but a right consonant to the first principles or laws of morality

(A) Since the publication of the two first editions, I have been informed, by the gentleman who drew this will, that no such declaration could have been made, and that the question alluded to, as put by Mr. Dixon, to the

drawer of the will, was not put at the time of making, nor, in the recollection of the party, at any other time, the drawer having made it without knowing of any mortgage or other charge affecting the estate.

and equity, as springing from the moral obligation a man was under to make a provision for his wife. And we accordingly found it, in a variety of cases, aided and extended beyond its strict *legal limits*, by the interposition of our courts of equity, in removing trust terms, and other obstructions to it in certain cases, which would stand in the way of it at common law. This proved it to be a right not merely confined to our common law, but a right recognized, protected, and aided in equity; and which, so far as it was the subject of relief in equity, must be considered as an equitable right (i). This was the predicament in which it stood in the case of *Dudley v. Dudley*, *Higford v. Higford*, *Wray v. Williams*, and the other cases, wherein it had been decided that a dowress should have the benefit of a trust term attendant on the inheritance, as against the heir. Considering it therefore as an *equitable right*, it well might be a wonder how it came about, that a widow should not be entitled against the heir to dower of an equitable inheritance. Some, indeed, had confined the rule of her not being so, to the cases where the trust was created by the husband himself (k); this was the opinion of the Master of the Rolls in *Banks v. Sutton*; however, this opinion had been over-ruled, and it seemed to be a settled point, that a widow was not dowable of a direct proper trust.

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Saville.

This naturally leads to the second head of argument in favor of the widow; namely, the distinction between a *mere trust*, that was an use, as it was styled at common law, and an *equity of redemption*; the former was regarded at common law as quite a distinct interest from the legal estate, to which the right of dower was annexed. It, of course, did not involve in it that right; if it had, there would have been two opposite rights of dower in the same lands at the same time; as the widow of both the *trustee* and of the *cestui que use* would have been entitled to dower. For the widow of the trustee was clearly entitled at common law; and when the Court of Chancery interposed to prevent the *legal* title of the widow of the trustee, it seemed extraordinary that it did not, in its place, substitute

Equity of redemption, and mere trust, distinguished.

(i) Ante, [vol. i. 230, 231.—Ed.]

(k) Ante, 691, et seq.

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v.
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ingly found himself constrained, instead of changing his ground as before, to enter into a strict examination of it, and meet the objections to dower with authorities, inferences, and general reasoning, and through them to come to a professed decision of the point, as he expressly did when he said, " he did not know or could find any instance where dower of an equity of redemption was controverted and adjudged against the dowress ;" and as there were authorities in cases less favorable, he therefore declared, that the widow of the person entitled to the equity of redemption of the mortgage in question, *which was a mortgage in fee*, had a right of redemption ; and decreed her the arrears of her dower from the death of her husband, she allowing the third of the interest of the mortgage money unsatisfied at that time : that an authority more directly in point than this was could not be expected. And though the subsequent case of the *Attorney-General v. Scott (m)*, (before Lord Talbot) in which the widow was denied dower, was generally considered as an authority contrary to, and superseding that of *Banks v. Sutton* ; yet such a conclusion seemed too hasty, as the two cases appeared to differ materially ; for in that of the *Attorney-General v. Scott*, although there was a mortgage, yet the question did not turn upon that, because the legal estate was outstanding in trustees, in whom it was vested antecedent to such mortgage, and consequently the decision in that case was on a direct proper trust, and not on mere equity of redemption. And the difference between a *direct trust* and an *equity of redemption*, and between the claim of a widow and that of a devisee or mere volunteer, was strongly insisted upon ; and the distinction between this case and that of a claim of dower against a purchaser fully enforced.

Decree,
Widow not en-
dowable of
equity of re-
demption on
mortgage in
fee made before
marriage.

But the Lords Commissioners said (n), that the case of an estate by the curtesy in a trust was the anomalous case, not the rule, that the wife should not have dower : and that this point was so much settled, that it would be wrong to discuss

(m) *Attorney-General v. Scott*, Ca. temp. Talb. 158.

(n) Vide Gilb. *Lex pratoria*, 266, 267.

it much; and the bill was dismissed, but without costs, *the defendants not praying them* (R).

(R) This case is shortly stated in 1 Bro. C. C. 325, without variation in any material point. The case of *Banks v. Sutton*, though not expressly over-ruled by the case in the text, has since been denied to be law by abundant authority. Thus, in *Chaplin v. Chaplin*, Lord Talbot said, that it had been the common practice of conveyancers, agreeably to the rule of law before the statute, to place the legal estate in trustees to prevent dower; wherefore it would be of the most dangerous consequence to titles, and throw things into confusion, contrary to former opinions, and the advice of so many eminent and learned men, to let in the claim of dower upon trust estates; 3 P. Wms. 234. Lord Alvanley, in *Curtis v. Curtis*, 2 Bro. C. C. 630. (S. C. 2 Ves. jun. 124, cited) observed:—"It is now too late to contend that the widow can have her dower out of any estate in which her husband had not the legal fee; for *Banks v. Sutton*, (2 P. Wms. 700) is not now to be supported; not that there appears to have been any decision directly contradicting it; for *Attorney-General v. Scott*, Ca. temp. Talb. 138, did not mean to find fault with *Banks v. Sutton*. However, it is now a settled point. Dower, therefore is a mere legal demand, and the widow's remedy is *prima facie* at law." The doctrine, as settled by *Dixon v. Saville*, was again distinctly acknowledged by Lord Thurlow in *Williams v. Lambe*, 3 Bro. C. C. 263, who said, that if it turned out that the mortgage (being in fee) was made before marriage, there would be an end to the widow's claim of dower.

Dower a legal demand.

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Lord Redesdale's observations on this head are too important to be omitted. In *Darcy v. Blake*, 2 Sch. & Lef. 388, his Lordship observed:—"The general principles upon which courts of equity have proceeded in cases of dower is, that dower is to be considered as a mere legal right; and that equity ought not to create the right, where it does not subsist at law: therefore there can be no dower of an equity of redemption reserved upon a mortgage in fee, though there may of an equity of redemption upon a mortgage for a term of years, because in that case the law gives dower, subject to the term. The principles on which this doctrine was originally settled, were these:—Pending the coverture, a woman could not alien without her husband; and therefore nothing she could do could be understood by a purchaser to affect his interest: but where the husband was seised or entitled in his own right, he had full power of disposing, except so far as dower might attach: and the general opinion having long been, that dower was a mere legal right, and that as the existence of a trust estate previously created, prevented the right of dower attaching at law, it would also prevent the property from all claim of dower in equity, and many titles depending on this opinion, it was found that it would be mischievous in this instance that equity should follow the law: and it has been so long and so clearly settled, that a woman should not have dower in equity, who is not entitled at law, that it would be shaking every thing to attempt to disturb the rule. In point of remedy, a woman claiming dower may be assisted in equity. A court of equity will put out of her way a term which prevents her obtaining possession at law; *Radnor v. Vandebendy*, Pre. Ch. 65, S. C. Show. Par. Ca. but that is only as against an heir or volunteer not as against a purchaser, the

Reasons for not allowing dower of equity of redemption.

Banks v. Sutton, and Dixon v. Saville, distinguished.

However, it is necessary here to remark, that there were some circumstances which distinguish the case of *Banks v. Sutton* from this of *Dixon v. Saville*; particularly that, in the former case, the mortgage was made by the ancestor of the husband, whose widow claimed dower, and the estate came to

heir or volunteer being considered as claiming in no better right than she does. When, therefore, any questions of dower have arisen in courts of equity, and doubts have been entertained of the title to dower, the constant practice in England has been to put the widow to bring her writ of dower at law. The courts will assist her in trying her right, and enjoying the benefit of it, if determined at law in her favor; by giving her discovery of deeds; by ascertaining metes and bounds; and they do not require her to execute the writ with all the formalities necessary at law; and the right being ascertained by judgment at law, will give her possession according to her right; but still they require that the question of her title to dower, if subject to doubt, should be determined at law. What was thrown out by Sir Joseph Jekyll in *Banks v. Sutton*, has been over-ruled. See Cox's note (1) 2 P. Wms. 719. The rule of courts of equity, so far as it excludes a widow from dower of an equitable estate against an heir or volunteer, goes perhaps, beyond the reason of the rule. But I have called this subject to my recollection a good deal, by looking into the authorities since this case was first mentioned; and the decisions to the full extent are so old, so strong, and so numerous—so generally adopted in every book on the subject, and so considered as settled law, that it would be very wrong to attempt at this time, to alter them. Nor do I think that the doubts which have been suggested with respect to an equitable estate, can be fairly raised in this case; where the claim is of dower of estates leased for lives before the marriage, and continuing subject to such leases at the death of the husband. Of those parts of his estate, the late husband of the defendant, Margaret Blake, was not so seised as to entitle her to dower at law; and if equity were strictly to follow the law, she could have no claim in equity for dower of those estates. The husband had not such a seisin as would entitle his wife to dower. The exception, therefore, must be over-ruled." The exception was, to the Master's report, that the defendant was not entitled to dower; for that it appeared, the estates in question were let at the time of the marriage on leases for lives, and continued so let during the coverture.

Leases for lives not expiring during coverture, widow not endowable.

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General result of cases.

1st. As to a mortgage in fee.

The result therefore is, that if the husband's estate be in mortgage for an estate in fee-simple previously to the marriage, and remains so during the coverture, the widow will not be entitled to dower; for at law, the whole legal estate of inheritance is in the mortgagee; and the right of redemption is merely an *equitable* title, incompetent to create a claim of dower. If the mortgage be made after marriage, then we have seen that the dower having attached by the marriage the wife must do some act, as levy a fine or suffer a recovery, in order to bar herself of dower. If a mortgage in fee be made after marriage without a fine or recovery, the wife, on her husband's death, may sue for her rights in a

him, by devise subject thereto; also, that the testator seemed to have intended, that the mortgage should be paid off out of his personal estate, and the rents and profits of the real estate, which would accrue before the devisee attained his age of

legal way, and recover a third part of the estate in the hands of the mortgagee. And if a mortgage in fee be made after marriage with the assistance of a fine or recovery wherein the wife concurs, it has been submitted (see ante, pages 677, 8, *in notis*), that the wife may nevertheless redeem, and so become entitled to dower, by proceeding against the heir for a contributory share of the mortgage, and an exoneration of her estate in dower out of the personal estate of her husband, according to the rules laid down, ante, vol. i. page 312, and page 681, the fine or recovery in such case, operating only as a partial conveyance and alienation of her rights. And it may be asked, if then a mortgage in fee after marriage in which the wife joins by fine or recovery, operates as a bar to dower, *pro tanto* only; why should not a mortgage before marriage be limited to the same effect? The answer is, that in the former case the dower has attached; in the latter it has not; and of an equity of redemption barely, whether expectant on a mortgage in fee or on a mortgage for years a widow is not endowable; and, it is scarcely necessary to add, that in the case of a mortgage in fee made before marriage, the husband on the celebration of the matrimonial contract has but a bare equitable title, of which we have seen the widow cannot be endowed. It is further open to remark, that in the case of a mortgage in fee made before marriage, if the money be paid on the day named in the condition the estate will revert in the husband, and the wife will consequently become entitled to dower; but no subsequent payment of the mortgage money by the husband will render his wife dowable if he dies before a reconveyance of the legal estate of inheritance has been taken to himself and his heirs. Bro. Abr. Dow. pl. 11. Vin. Abr. Dow. (G. 2), pl. 5. Perk. s. 392.

As to a mortgage for years made before marriage and which is subsisting at the time of the husband's death, there a legal reversion remains with the husband, to which the equity of redemption will become united, and of the legal reversion the wife will be entitled to dower. And since it is the doctrine of courts of equity, that every person having an interest in the reversion shall have an equivalent interest in the equity of redemption, the dowress may consequently redeem the mortgage. But this latter branch of the subject has been entirely exhausted in a previous note, see ante, p. 689, n. (P). It is therefore merely necessary to add here, that a widow has been denied free bench of a trust estate of copyholds, on the ground, perhaps, of the decision in *Dixon v. Sarille*, which, however, was very inapplicable in principle to the case before the court. *Forder v. Wade*, 4 Bro. C. C. 525.

The old cases on allowing dower of trusts are the following: *Colt v. Colt*, 1 Ch. Rep. 234, 2d ed. *Fletcher v. Robinson*, Pre. Ch. 250, cited *S. C.* 2 P. Wms. 710. cited from Reg. Lib. *Rudnor v. Rotheram*, Pre. Ch. 65. *Bottomley v. Fairfax*, *ibid.* 336. *Daly v. Lynch*, 1 Bro. P. C. 538. *Ambrose v. Ambrose*, 1 P. Wms. 321. *Robinson v. Tongue*, 1 Atk. 604.

2d. As to a mortgage for years.

Old cases on allowing dower of trusts.

twenty-one; at which time a moiety of the legal estate was positively directed to be conveyed to him. For although the former circumstance of the mortgage descending, does not appear to me to afford any argument of considerable weight in favor of the dowress, because, the only inference that could be drawn from that circumstance would be, that the mortgage being made by the ancestor, and not by the husband, it could not be concluded that there was any intention in the husband to make the mortgage a means of depriving the wife of dower (which was a distinction, that had been attempted to be made, in cases when the wife claimed dower of trusts between trusts descending and trusts made by the husband); but which inference could not be applied to the case of a mortgage, because, whether that descended to, or was made, by the husband, the intention with which it was made, was obviously with a view to raise money only, and could not, by any argument, be made to supply an inference, that it was done with a view to prevent dower: yet the latter circumstance might perhaps be considered as deserving more weight; for, if the trustee, who was himself the mortgagee, by misapplying the personal estate of the testator, and the rents and profits of his real estate, was himself the cause of the mortgage standing out, and made this reason to hold back the conveyance of the legal estate, according to the directions of the testator, there seems as much reason for the application of the rule of equity of *considering that as done, which ought to be done*, in order to let in the widow in equity, to the same degree of title, *notwithstanding the mortgage*, as she would have had, if the trustee had conveyed the estate to the husband at the time directed, as there was for the application of it for that purpose, *notwithstanding a trust* (s).

The rule "that is considered as done, which ought to be done," applies to every case except dower.

(S) The rule in equity, that what has been agreed to be done for valuable consideration, is considered for many purposes as actually done, *holds in every case except in dower*. *Crabtree v. Bramble*, 3 Atk. 687. So much, therefore, of the learned author's argument as depends on this principle of equity, as also that portion of Sir Joseph Jeykll's judgment in *Banks v. Sutton*, where he observes, that when an act is to be done by a trustee, *that is to be looked upon as done*, &c. (see 2 P. Wms. 706. 2 Eq. Ca. Abr. 385,) must be considered as disposed of and over-ruled.

And it is observable that, in this point of view, the cases *And reconciled.*
of *Banks v. Sutton*, and *Dixon v. Sir George Saville*, are perfectly reconcilable, and may stand together, the former being considered as establishing the general principle of law, that the wife of one entitled to an equity of redemption of a mortgage in fee, shall not be entitled to dower out of such estate; the latter, as an exception to that general rule, as falling under [703]
another and distinct principle of equity. *Sed quære* (T).

And that there may be exceptions to this rule, as to trusts, *Trustee delaying to convey legal estate to husband, widow decreed free-bench of equitable estate* (U).
is evinced by the resolution in the case of *Otway v. Hudson* (o); in which case, tenant in tail of the trust of a copyhold estate, having desired the lord to admit him, and being refused, and having brought a bill against the trustees to have a surrender made to him of the legal estate, died, *pending the suit*; and, although the husband was never seised of the legal estate of

(o) *Otway v. Hudson*, 2 Vern. 583. This was a case of customary dower. [S. C. 2 Ch. Ca. 174.—Ed.] N. B. Vide 2 Atk. 526. per Ld. Hardwicke.

(T) The learned author here endeavours to shew that the two cases of *Reconciliation of cases in text unavailable.*
Banks v. Sutton and *Dixon v. Saville*, are dissimilar, and therefore that the former ought not to be considered as over-ruled. Lord Alvanley, however, has said, that *Banks v. Sutton* is not to be supported; see ante, p. 699, n. (R); and Lord Talbot, in *Attorney-General v. Lockley*, App. Sug. V. & P. No. xvii. p. 33, 5th edit. is reported to have declared that the true reason for the decree in *Banks v. Sutton* was, that the wife married Sutton on the expectation of the estate, and it was a fraud in the husband not to call for the settlement. If so, all that was said in *Banks v. Sutton* about dower and its incidents, was extra-judicial, and of little weight against the unanimous decree of the three Judges in *Dixon v. Saville*.

(U) As a general rule, a widow will not be allowed free-bench of a trust or equity of redemption in a copyhold estate: to allow that, would be to raise an anomaly upon an anomaly, according to Lord Loughborough in *Forder v. Wade*, 4 Bro. C. C. 521. Whether a court of equity would now permit a widow to avail herself of the delay and obstinacy of a trustee may perhaps be a matter of doubt, especially if Lord Hardwicke's observations in *Crabtree v. Bramble*, mentioned in the last note but one can be supported. And it is worthy of notice that one great reason for allowing free-bench in *Otway v. Hudson*, arose from the circumstance of the husband's being in possession and an actual receipt of the rents and profits up to the time of his death. See, for this fact, Mr. Raithby's note (2) to 2 Vern. 548, who refers to Reg. Lib. 1706, B. fol. 192. And there is in equity this distinction between an actual assignment, and a mere, voluntary covenant to assign, that equity will not construe such a covenant beyond the letter. *Basse v. Grey*, 2 Vern. 692. *No free-bench of equity of redemption.*

the copyhold, yet the widow was decreed her free-bench; which was a decision contrary to the rule laid down in the principal case, but founded upon an equity raised in favor of the wife; because of the great and obstinate delay of the trustee, who refused, and stood out a bill requiring him to convey.

Wife of mortgagee in fee not entitled to dower in equity.

[704]

It was formerly a doubt whether (p), upon a mortgage in fee, the mortgaged estate did not become liable to the dower of the wife of the mortgagee (q), which occasioned the introduction of long terms for years by way of mortgage, with condition to be void upon re-payment of the mortgage-money; but that doubt hath been long since over-ruled in our courts of equity, and it is now clearly settled, that *an equity of redemption* is not liable to the dower of the wife of the mortgagee (r) (w).

(p) Litt. sec. 357.

(q) 2 Bla. Com. 158.

(r) Hard. 466. Cro. Car. 190, 1.

Correction of text.

(W) Read, "and it is now clearly settled, that the legal estate in the mortgage will not be liable to the dower of *his* wife." See ante, vol. i. page 7, note (D), and, to the authorities there cited, add 1 Rol. Abr. 6. 79, pl. 50, *Bevant v. Pope*, 2 Freem. 71, and *Hinton v. Hinton*, 2 Ves. 633.

CHAP. XVII.

OF MORTGAGES MADE BY THE HUSBAND AND WIFE, OR THE HUSBAND ALONE, OF THE WIFE'S ESTATE, AND HIS INTEREST IN MORTGAGE MONEY DUE TO HER (A).

AS the husband, by virtue of his marriage, obtains no other interest in his wife's estates of inheritance, than an estate of freehold, in her right, for their joint lives in case there be no issue of the marriage, and for his life, as tenant by the curtesy, if there be (a); it follows, of course, that he alone cannot make a valid mortgage thereof, to be binding upon her and her heirs, for any longer period (b). And therefore, where one, seised in fee, in right of his wife, of a share of the New River water, joined with her, and made a mortgage, by way

Mortgage by husband and wife, without fine, of her New River Shares, ceases with coverture.

[705]

(a) Co. Litt. 351.

2 P. Wms. 127, [et vide 2 Fonb. Tr.

(b) *Bryan v. Woolly*, 4 Vin. Abr. on Eq. 312.—Ed.]

57, pl. 19. *Drybutler v. Bartholomew*,

(A) This chapter contains, 1st. A collection of cases, shewing the necessity of the wife's joining in a fine on the mortgage of her estate, and herein of the effect of the husband's covenant, that his wife shall levy a fine, from hence to 713; 2d. An inquiry to whom the equity of redemption on a mortgage of the wife's leasehold estate belongs, from 713 to 715; 3d. An investigation of the husband's power to charge or assign his wife's trust terms, from 715 to 721; 4th. A statement of the law concerning the surviving wife's confirmation of her husband's void mortgage, from 721 to 729. 5th. A consideration of the extent to which the wife's estate is liable on joining her husband in a mortgage of her inheritance, and herein of the wife's right to exoneration out of the husband's personal estate, from 729 to 731; 6th. A disquisition concerning the effect of the wife's fine, when she joins her husband in a mortgage of her estate of freehold or inheritance, especially as to the right of redemption, from 731 to 737; 7th. An enumeration of the instances wherein the husband will be entitled to his wife's mortgages and *chooses in action*, either as a purchaser, by means of a settlement, or as a volunteer *jure mariti*, by reduction of them into possession, from 737 to 755; 8th. An examination of the authorities respecting a provision for the wife and family, in case the husband or his assignees (either in bankruptcy or otherwise) deprives the wife of her mortgages and equitable *chooses in action*, from 755 to 769; and 9th. A reference to a few other matters relating to the subject of this chapter, from 769 to the end.

Contents of chapter.

of lease for 1000 years, reserving a pepper-corn rent, by deed without fine, and died; a bill brought by the mortgagee to foreclose, was dismissed by the Master of the Rolls, saying, that a fine might be, and usually was, levied, of New River shares, and in this case, there ought to have been one, it being the inheritance of the wife; and that, this having been omitted, and the lease expiring by the death of the husband, the mortgage was also thereby determined, and nothing remained to foreclose (B).

Purchase in name of husband, wife, and daughter, an advancement, and husband cannot mortgage.

And where after marriage the husband made a purchase of a copyhold estate, and took the surrender to himself, and his wife, and his daughter, and their heirs; and he afterwards, as being visible owner of the estate, took upon him to make a conditional surrender by way of mortgage to a stranger, and afterwards died (c); a bill was filed in Chancery against the mother and daughter to discover their title, and to set aside their estates as fraudulent against the mortgagee, who was a purchaser; *sed non allocatur*, for, by the court, the husband and wife took one moiety by entireties, so that the husband could not *alien* or *dispose* of it, to bind the wife, and the other moiety was well vested in the daughter (c).

(c) *Back v. Andrews*, 2 Vern. 120.

River shares are real estate.

(B) Shares of the New River Company are always acted upon as real estate, and recoveries are suffered, and fines levied of them in the same manner as upon any other description of inheritable property, *Buckridge v. Ingram*, 2 Ves. jun. 652; where it was held that the shares in the navigation of the River Avon, under the statute of 10 Anne, are real estate, and subject to dower. Whatever comes properly within the description of a tenement, or, to use the words of the Master of the Rolls in the above-mentioned case of *Buckridge v. Ingram*, "wherever a perpetual inheritance is granted, which arises out of land, or is in any degree connected with, or exercisable within it, it is that sort of property which the law denominates real," see 2 Ves. jun. 664.

As to confirmations of the mortgage by the wife after coverture by payment of interest or otherwise, see post, 721, et seq. where the principal case is further commented on, and its authority as to these latter points questioned.

Reference to prior cases.

(C) Where a husband purchased a term for himself and his wife, and the survivor, and after mortgaged it without his wife, and then died indebted, the equity of redemption was held to be assets; see the case of *Watts v. Thomas*, 2 P. Wms. 364, and cited ante, vol. i. 290, in the text, and post, 772, 3. As to

But, if the wife joins in a mortgage of her lands and levies a fine thereof, this will be binding upon her and her heirs, notwithstanding the coverture. For as, by such process, she may make an absolute alienation of her real estate, so may she make a conditional one thereof (D).

Wife may mortgage her estate by fine.

And a fine, levied by a *feme covert*, will make a mortgage of her trust, as well as of her legal estate, valid (d). Thus, where the defendant P. before her marriage, conveyed, with her intended and after husband's privity (E), the premises in question to trustees, in trust, to pay the rents and profits to her sole and separate use for her life, and, after her decease, in trust for such uses as she, whether sole or covert, should by her last will limit and appoint, and, for want of such appointment, then to her own right heirs for ever. Afterwards, she mortgaged part of the lands to the plaintiff for a term of five

Whether it be legal or trust estate.

(d) *Penne v. Peacock*, Ca. temp. Talb. 41.

the advancement by purchase in the name of a wife or child (which by the way is not much within the scope of a treatise on mortgages); see 2 Watk. Cop. 274, 4th edit.

(D) And the wife joining in the fine will be bound by the deed leading or declaring the uses, though no party to such deed, provided the uses be not inconsistent with the intent and purpose for which the fine was levied. *Swanton v. Raven*, 2 Atk. 103; and *Beckwith's case*, 2 Co. 57. This proviso is a very essential member of the sentence: if omitted, the husband, having obtained his wife's consent to a slight incumbrance, and procured her concurrence in a fine for the purpose of securing the mortgagee, might (without any opposition from the wife's friends, or the judge before whom she is examined), by a subsequent and clandestine declaration of other uses, be able totally to make away with her estate, which the solemnity of the fine was meant to prevent. In *Fleetwood v. Templeman*, 2 Atk. 79. S. C. post, 1044, where a fine was covenanted to be levied in Easter Term following the date of the deed leading the uses, but no fine was levied till three years afterwards, when the husband and wife joined in a new declaration of uses of the fine "theretofore levied," it was held, that this declaration was binding, notwithstanding it differed materially from the first declaration; for that the covenant to levy the fine in the first deed was not strictly pursued.

Wife not a necessary party to deed declaring uses of fine, in which she has joined.

(E) The privity of the husband is absolutely necessary to the validity of the settlement made by the wife of her estate after the marriage treaty has commenced. See *Howard v. Hooker*, 2 Ch. Rep. 81, and *Strathmore v. Bowes*, 1 Ves. jun. 28, and post, 719, 20.

hundred years, to secure the sum of 1000*l.* and a fine was levied by husband and wife, who both declared the uses, as to the mortgaged premises, to be to the plaintiff for securing the principal and interest. On a bill exhibited, the wife, by order of Court, answered separately; insisting, as to this point, that the legal estate being in the trustees, the parties to the fine had not such an estate therein, whereof a fine could be levied to bar her right. But the Lord Chancellor, as to this objection, observed, it was very well known that the operation of fines and recoveries was the same upon trusts as upon legal estates (*d d*), and if so, it must inevitably follow, that an estate for life limited to the wife, remainder to her own right heirs in default of any appointment made by her last will, was disposed of by the fine; and if no such remainder had been limited by it, yet as the estate was the wife's, and moved originally from her, whatever was not conveyed would have remained in her, and consequently been barred; and his Lordship decreed the trustees to convey to the plaintiffs the mortgagees.

[707]

Specific performance of husband's covenant that wife should levy a fine, decreed.

Where a husband, for a valuable consideration, covenanted that his wife should join with him in a fine, the Court of Chancery decreed the husband to perform it, for that he had undertaken it, and he must lie by it if he did not perform it (*e*): because in such case it is to be presumed that the husband, where he covenants that his wife shall levy a fine, has first gained her consent for that purpose, and the interest in such covenant has been taken to be an inheritance descending to the heir of the covenantee.

Quære, if she refuse to concur.

But, if it can be made appear to be impossible for the husband to procure the concurrence of his wife (as suppose there are differences between them) surely the Court would not decree an impossibility (*f*); especially if the husband offer to

(*d d*) [See Cov. on Rec. p. 322.—*Ed.*]

(*e*) *Barington v. Horn*, 2 Eq. Ca. Abr. 17, pl. 7. 5 Vin. Abr. 547, pl. 15. 3 P. Wms. 189, et note (B) there.

(*f*) *Winter v. Devereux*, 3 P. Wms. 189, n. (B), [et vide what is said by Lord Eldon, of a covenant for further assurance, ante, p. 690, n. (P).—*Ed.*]

return all the money, with interest and costs, and to answer all the damages (F).

(F) The cases on this head are conflictory. On the one side may be classed *Barington v. Horn*, 2 Eq. Ca. Ab. 17. *Rust v. Whittle*, Toth. 94. *Griffin v. Taylor*, *ibid.* 106. *Anon.* 2 Ch. Ca. 53. *Hall v. Hardy*, 3 P. Wms. 188. *Withers v. Pinchard*, in Chan. July 7th, 1795, and *Morris v. Stephenson*, 7 Ves. 474. On the other side may be ranked *Preston v. Wasey*, Pre. Ch. 76. *Otread v. Round*, 4 Vin. Abr. 203, pl. 4. *Sedgwick v. Hargrave*, 2 Ves. 56. *Daniel v. Adams*, Amb. 495. *Moreau's case*, 2 W. Bl. 1205. *Emery v. Wase*, 5 Ves. 848. *Davis v. Jones*, 1 New Rep. 269. *Howell v. George*, 1 Madd. Rep. 1, and *Brick v. Whelley*, cited *ibid.* 7, n.

I. As to the cases which confirm the doctrine in the text:—In *Rust v. Whittle*, Toth. 94, the court decreed, that the defendant should compel his wife, and another man's wife, being the other defendant, to levy a fine, and join in the assurance; and in *Griffin v. Taylor*, *ibid.* 106, the court ordered a man to procure his wife to acknowledge a fine of mortgaged lands. On the same principle the *Anonymous case*, in 2 Ch. Ca. 53, was decided. There a father and son *infra viatam*, covenanted to convey lands for valuable consideration, on the son's coming of age. The father was decreed to procure his son's confirmation of the conveyance. In the next case, Sir Joseph Jekyll said, there had been a hundred precedents where it had been held, that if the husband for a valuable consideration, covenants that the wife shall join with him in a fine, the court has decreed the husband to do it, for that he has undertaken it, and must lie by it, if he does not perform it. *Hall v. Hardy*, 3 P. Wms. 188.

The unreported case of *Withers v. Pinchard*, in Chan. 7th July, 1795, mentioned by the counsel, arg. 7 Ves. 475, seems to have proceeded on a similar principle. There an agreement was entered into by a man on behalf of himself and wife, to sell the estate in question to the plaintiff. One moiety was the wife's. The estate was settled to certain uses, with a power of revocation in the husband and wife, with consent of the trustees. The wife by her answer, as well as the husband, swore, that she never gave her consent to the sale; and they stated, that they believed the trustees would not consent to the revocation of the uses. Nevertheless, the Lord Chancellor decreed a specific performance; and that the husband should convey, and should procure all proper parties to convey, as the Master should direct, if the parties should differ concerning the conveyance.

This case was followed by *Morris v. Stephenson*, 7 Ves. 474, where the husband under circumstances, was decreed to procure his wife to join in a surrender of a copyhold estate, which he had covenanted (the wife consenting) that he and his wife should within one month, surrender to the use of a trustee in trust to sell and pay debts. Sir William Grant, M. R. observed, that the defendant (the husband) did not allege that he was unable to procure his wife to join; nor did he offer to pay the debt; it was impossible to put the plaintiff in the same situation, as if the deed of covenant had never been executed; for the plaintiff would have had an execution against the husband, if he had not redeemed himself by giving this security. It was unnecessary, therefore, to discuss Lord Cowper's reasoning in *Otread v. Round*, (a case after-men-

Husband's covenant that wife shall join him in fine, enforced.

Though wife never gave her consent to sell.

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Husband decreed to procure his wife's concurrence in surrender.

Wife not barred, if fine not perfected before husband's death.

A covenant from the husband and wife, that he and his wife will levy a fine, will not be binding upon her in case of

tioned); that case being so extremely dissimilar to the one before his Honor. The defendant there stated absolute inability to perform, and offered to put the other party in the same situation as if the agreement had never taken place. Here the only objection stated to the performance of the agreement was, that such agreement was obtained by fraud; not that the wife was unwilling to enable her husband to perform it, merely because it was incompetent in him to dispose of her estate; but because he and she were imposed upon in entering into and executing the deed. The case of *Withers v. Pinchard*, in 1795, was infinitely stronger; for the wife never had expressed any assent. The first time she was consulted she expressed her disagreement. The contract was made without her knowledge, yet she was decreed to perform it without regard to the possible consequence resulting—that to relieve him she might be under the necessity of disposing of her estate. But here the wife executed the deed; and even in the covenant it was declared, that it was entered into with the express consent of the wife. In such a case it was too much, his Honor thought, to say that there should be no specific performance, merely because the defendant was a husband, and therefore exempted from performing his covenant respecting his wife's estate, for *non constat* that there was any difficulty in obtaining her consent. The decree therefore was, that the husband should specifically perform his agreement, and procure his wife to join in the fine.

Cases annulling rule in text.

II. The cases which tend to disaffirm the doctrine advanced by the learned author, are the most numerous—the more modern—and the best considered. Consequently little doubt can be entertained of their authority to annul the rule in *Barington v. Horn*; but it should be remembered, that no case has expressly decided that the husband shall not be bound specifically to perform his covenant, that his wife shall join him in levying a fine. The case of *Preston v. Wasey*, Pre. Ch. 76, is the first that occurs in the books on this side of the question. There, the defendant's wife was the heiress at law of the testator under whose will the plaintiff claimed. The plaintiff having some reason to doubt the validity of the will, prevailed on the defendant and his wife, for a small consideration, to enter into articles to convey the lands in question to make good the will, under pretence that there was some mistake therein. The bill was for a specific performance of the articles, but it appearing that the defendant and his wife were not well apprised of the interest they had in the lands, and that there was some art used in procuring their concurrence, the Master of the Rolls would not decree the prayer of the bill, but left the plaintiff to his remedy at law; and on appeal, my Lord Keeper affirmed the decree, but went upon the fraud, and did not seem to take notice of its being the inheritance of a *feme covert*. From this case, therefore, little more can be gleaned than that it seems to militate against the doctrine propounded in the previous cases.

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Husband not bound by cove-

The next case, however, is strong in confirmation of the rule, that the husband will not be bound in equity to perform his covenant (though founded on

his death. Therefore, where one (g) seised in tail, for valuable consideration bargained and sold to another in fee,

(g) *Hody v. Lunn*, 1 Rol. Abr. 375. Mich. 5 Car. 1. S. C. 1 Eq. Ca. Abr. 61, 2.

a valuable consideration) to procure his wife to join with him in a fine or other conveyance. The case is that of *Otread v. Round*, 4 Vin. Abr. 203, pl. 4, where the husband and wife, for a valuable consideration, by lease and release, conveyed the wife's lands in fee, and the husband covenanted that she should *levy a fine* of them to the use of the purchaser. The wife afterwards *refused* to levy the fine, upon which the purchaser filed a bill for a specific performance of the covenant. The husband, by answer, admitted the covenant, and said, that he was ready to levy a fine, but that his wife refused to join him, and that he *could not persuade* her to do so. Lord Cowper, who decided the case of *Barington v. Horn*, (2 Eq. Ca. Abr. 17) observed, that it was a tender point to compel the husband, by a decree, to procure his wife to levy a fine, although there had been some precedents in the court for it; and that it was a great breach upon the wisdom of the law, which secured the wife's lands from being aliened by her husband without her free and voluntary consent, to lay a necessity upon her to part with her lands, or otherwise to be the cause of her husband lying in prison all his days; and his Lordship declared, that he did not in *that case* think it proper to decree a specific performance of the covenant, but that the husband must refund the purchase-money which he had received, with costs.

nant to procure his wife to levy a fine, if she refuse.

So, in *Sedgwick v. Hargrave*, 2 Ves. 56; et vide Belt's Supp. 273, the husband and wife, in consideration of 200*l.*, renounced all claim to the estate in question, and by a joint answer in Chancery they both disclaimed all right whatever to the premises, and declared that they were willing to release the wife's title to the lands, and to join in any conveyance, or to do what act the court should think proper. In the suit wherein this answer was filed there were no further proceedings. But on a sale of the estate thirty years afterwards by the person who had been in possession that time, the husband hinted to the purchaser that his wife had a claim on the premises sold, and that a good title could not be made without her concurrence. The purchaser then declined proceeding in his contract, unless this cloud were removed. Whereupon the vendor filed a bill against him for specific performance, making the husband and wife parties, defendants, calling upon them to set out the nature of their claim, and praying that they might be decreed to convey or refund the said 200*l.* with interest. Sir John Strange, M. R. said he could not make a personal decree on the wife to join in the title, for no act had been done by her that the court could say was a parting with her interest [see ante, p. 679, *et seq.* as to a joint answer], and his Honor feared that a bare decree on the husband to join, or procure his wife to join, would not answer the ends of justice; but without doubt the 200*l.* should be refunded. The decree was, that J. H. the husband should join, and procure his wife to join, within a time to be appointed by the Master; and if they did not, then that J. H. should refund the 200*l.* to the plaintiff, and pay costs.—These cases

Same law.

covenanting that he and his wife would levy a fine for better assurance; and it was agreed that 30*l.*, part of the considera-

shew that the court will not in every instance decree a specific performance of the husband's covenant that the wife shall join him in making an effectual assurance of the lands, but that it will make a decree *sub modo* only, that is, in the alternative, namely, that the husband shall specifically perform his agreement, if he can procure his wife to join, but if he can prove that his wife refuses to join with him in the assurance required, the other party will be left to his remedy at law.

Husband directing agent to sell, no proof of his having obtained wife's concurrence.

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In *Daniel v. Adams*, Amb. 495, baron and feme had a joint power to sell the wife's estate. The baron employed an agent of his own to sell the property, delivering merely his wife's compliments to the agent in a letter to him, conferring the authority to sell. This was held to be no proof that the wife concurred in the authority to the agent, and Sir Thomas Sewell, M. R. said, that this was not such a case as would induce the court to compel the husband to procure his wife to convey. That where the wife was bound, she must have done something to confirm the agreement, as to receive some benefit from it. *Drury v. Drury*, 1 Ch. Rep. 49. That the note of *Barker v. Child* was very loose. That in *Barington v. Horn* the husband had received the consideration, and in *Hall v. Hardy* he had received part, and was willing to receive the rest. That those cases went on the ground of fraud; and, therefore, his Honor added, he must dismiss the bill; which he did, but without costs.

Wife may levy fine, subject to husband's disagreement.

Moreau's Case, 2 W. Bl. 1405, is the next in order. There the husband had sold and covenanted, that he and his wife when of age should levy a fine. The wife attained her age of twenty-one years, and at first refused to levy the fine. Her husband afterwards went abroad, and then she consented to levy the fine, and her acknowledgment as a *feme sole* was received by the Chief Justice of the Court of Common Pleas. This fine was levied without prejudice to the husband's right to avoid the same. The court would not by any means preclude him from the right to question its validity. All the Chief Justice did was to enable the wife to bind herself by receiving the fine from her, as if she had been a *feme sole*. But from the whole tenor of the case it appears, that his Lordship did not consider the husband's covenant to be binding on the wife; for at first he would make no rule to authenticate the fine, and afterwards did it *de bene esse* merely, the wife voluntarily assenting thereto. See further on this head, *Stead v. Izard*, 1 New Rep. 312.

Reasons against compelling husband to procure wife to concur.

We now turn to the modern decisions on this subject, and find the doctrine placed on a very different footing. Two grounds are taken, whereon powerful arguments against the adoption of the rule in the text are raised. The first is, that if the husband's agreement be held binding on the wife, then her interests may be bound by agreement, which could not be bound by conveyance; and the second, that if the doctrine be adopted it would contravene the policy of the law; for that the wife could not truly aver, that she freely and voluntarily assented to the fine, when in fact she was compelled to levy it by the decree of the court, or the influence and persuasion of her husband. These arguments were in part relied on in *Emery v. Wase*, 5 Ves. 846. In that case I. W., his daughters, and their husbands, entered into an agreement for the

tion-money, should be paid unto the wife upon the consunance thereof. A fine was accordingly acknowledged by them before

sale of an estate to which I. W. and his daughters were entitled, on a price to be fixed by an arbitrator appointed by all parties. The arbitrator, it was said by the vendors, had greatly undervalued the estate, and on that ground they resisted a bill filed by the purchaser for a specific performance of the agreement. Lord Alvanley, M. R. felt great hesitation in infringing on the award of an arbitrator chosen by consent of all parties, which, he said, could not be done either at law or in equity, unless upon fraud and imposition or gross mistake; but as against the married women, he had no conception that such an agreement could be enforced. That, indeed, would be binding their interests by agreement, which could not be bound by conveyance. How far the husband was liable in damages for not making good the agreement, or how far in equity he would be compelled to prevail upon his wife was another consideration. There had been instances of committing the husband to the Fleet, till the wife should do the act; and there was one instance where the husband staid a great while in prison, and then made it appear that he could not prevail on his wife, and was discharged. The bill in the case before his Lordship was, it was true, resisted expressly on this ground; but Lord Alvanley thought that a mere simple agreement to sell at whatever price a third person should name, was not such an agreement as the court would be very desirous of enforcing, and when he saw that some of the parties were not competent (being married women), he should hold that the purchaser had not made out a right to a specific performance. The plaintiff had that which was open to every one, a remedy at law for the breach of the agreement; to which remedy, under the circumstances, his Lordship left him. The bill was consequently dismissed, but without costs. On appeal to the Chancellor the decree at the Rolls was affirmed, see 8 Ves. 519. The doctrine, it is conceived, was on that occasion placed in its true light, and it is to be regretted that the noble and learned Lord who affirmed the decree, did not finally fix the point conformably to his opinion by actual decision, but his Lordship chose rather to rely on other grounds, than pronounce a decided opinion on a question which he was not expressly called on to determine.

Lord Eldon observed (8 Ves. 514):—"By this appeal I am called upon to reverse a judgment that appears to have been made upon great consideration. Certainly the general point is of great importance, whether the contract of the husband, which, however, this was not intended to be, but that of the daughters, is to be executed against the husband by a court of equity; in effect compelling the husband to compel his wife to levy a fine which is a voluntary act. The policy of the law is, that a wife is not to part with her property, but by her own spontaneous and free will. If this were perfectly *res integra* I should hesitate long, before I should say, that the husband is to be understood to have gained her consent, and the presumption is to be made, that he obtained it before the bargain, to avoid all the fraud that may be afterwards practised to procure it. I should have hesitated long in following up that presumption, rather than the principle and policy of the law; for if a man chooses to contract for the estate of a married woman, or an estate to

Because, first, that would be binding interests by agreement, which could not be bound by conveyance.

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And, second, it would be contrary to policy of law to compel wife to levy a fine—that being a free act.

a judge on the circuit in the vacation, and the 30*l.* paid her; the husband being sick in bed; and afterwards, and before

dower, he knows the property is her's altogether, or to a given extent. The purchaser is bound to regard the policy of the law; and what right has he to complain, if she, who according to law, cannot part with her property but by her own free will, expressed at the time of passing an act of record, takes advantage of the *locus penitentiae*; and why is not the purchaser to take his chance of damages against the husband? If the cases have determined this question so, that no consideration of the absurdity that must arise, and the almost ridiculous state in which this court must in many instances be placed, can prevail against their authority, it must be so. For the sake of illustration however:—Suppose the husband procures the consent of his wife even by the mildest means; persuades and influences her by the difficulties he has got into; and she is examined in equity by the judge, who has made the decree upon her husband; then, if upon the submission of all the considerations which ought to be submitted to her in this court, and the court of Common Pleas, she says, she thinks it in her situation not fit for her to part with her property, the court must send the husband to gaol; telling her, she never ought to relieve him from that state; and all this for the benefit of a person who cannot have a specific performance certainly, but who may have damages; and who sets up his title to a specific performance in opposition to the policy of the law. Upon the first ground, therefore, there is difficulty enough to make me pause before I should follow the cases of *Hall v. Hardy*, and *Withers v. Pinchard*, and I am not sure, whether it is not proper to have the judgment of the House of Lords to determine which of these decisions ought to bind us. As to the expression used by Lord Cowper, that this jurisdiction is to be very sparingly exercised, certainly it is very dissatisfactory to be informed, that it is, and it is not, to be done." But his Lordship was strongly inclined to think, that the decree at the Rolls was right on other grounds, which he stated at large, and concluded by observing, that he considered himself fairly justified in following Lord Alvanley, at least as far as Lord Cowper's principle would authorize him;—that if the property of a married woman is to be affected through the covenant of her husband, the court ought to act sparingly upon that; and upon the whole there was reasonable doubt enough, whether the valuation was made upon such a principle that it ought to bind married women. And, therefore, his Lordship affirmed the decree as above stated.

General rule,
that equity will
not compel hus-
band to procure
wife to levy fine.

Sir James Mansfield, C. J., in a late case in the court of Common Pleas, (where an action was brought on a covenant by a husband, that he and his wife would levy a fine, and he could not procure her concurrence) said, that the covenant upon which the action was brought, was such as the court of Chancery would not now enforce; and, he added, that nothing could be more absurd than to allow a married woman to be compelled to levy a fine through the fear of her husband being sued and thrown into prison, when the general principle of the law was, that a married woman should not be compelled to levy a fine. *Davis v. Jones*, 1 New Rep. 269. Hence we may infer, if this common law dictum can be relied on (and the learned judge, by whom it was uttered, was very conversant in the doctrines of equity, per Sir T. Plumer, V. C.

the ensuing term, he died; whereupon the wife stopped passing the fine, and brought a writ of dower. It was held the

1 Madd. Rep. 7); that a court of equity will in general refuse to compel the husband to procure his wife to join in levying the fine. A similar notion seems to have prevailed in *Howell v. George*, 1 Madd. Rep. 6, though with some reservation as to the full admission of the rule in all its latitude. In that case the husband (who was the defendant) conceived himself to possess an exclusive dominion over the estate, when he entered into the agreement for sale. It afterwards turned out that he was only tenant for life, and he stated in his answer, that his wife and son refused to join with him in suffering a recovery, so as to enable him to perform his agreement. He said, that he was willing to convey as far as he could, and to compensate the plaintiff for any injury he might have sustained. At the hearing, it was contended, that the defendant ought to be compelled to procure his wife and son to join with him in a recovery; or, that he ought to acquire a fee in the lands in question, and convey them to the plaintiff. "It was not much pressed in argument," observed Sir T. Plumer, in the course of his judgment, "that the husband ought to be decreed to procure his wife and son to join in a recovery. Indeed it could not be argued, that a man should be compelled to use his marital and parental authority to compel his wife and son to do acts which ought only to be spontaneously done. Those cases in which a husband was compelled to make his wife concur, had been, where he had agreed she should convey, and her consent might be supposed to have been previously obtained, but in this case there was no pretence that the defendant agreed that his wife and son should join in a recovery, and none of the cases had gone so far as to say, that a father could be compelled to procure his son to join in a recovery." Specific performance of the agreement was therefore refused. But see an instance, where a father was decreed to procure his son to join him in completing an assurance, which was made by the father and son, while the son was *infra ætatem*. *Anon.* 2 Ch. Ca. 53, cited ante, 707 a, in the first section of this note.

From this review of the cases it appears, that it is not definitively settled, *Result of cases.* whether, if a husband sells or mortgages his wife's estate, and covenants that she shall levy a fine for further assurance, he will, in every case, be decreed specifically to perform his contract. The cases evidently lean, and that very strong, towards the side of the husband; and in *Brick v. Whelley* (ante, 707 a) especially, a decided opinion in the husband's favor seems to have been pronounced by the House of Lords, as far as can be collected from a short note of that case in Lord Harcourt's MS. tables, where the result is stated to be that, "no agreement of the husband to part with the wife's inheritance shall bind the wife, or be carried into execution." Dom. Proc. 9th February, 1721. It is also observable, that Lord Redesdale, in *Costigan v. Hastler*, 2 Sch. & Lef. 166, declares the broad principle to be, that when a person undertakes to do a thing which he can himself do, or has the means of making others do, the court will compel him to do it, or procure it to be done, unless the circumstances of the case make it highly unreasonable to do so. Lord C. B. Gilbert put it doubtfully, whether the court would make the decree, if the bill be against the husband only; because the husband would then compel his wife,

bargainee had no remedy against the dowress, because it was contrary to a maxim in law, *that a feme covert should be bound without a fine.*

Baker v. Child,
contra.

Yet in a short note of the case of *Baker v. Child* (h), it is said to have been determined, that where a *feme covert*, by agreement made with her husband, was to surrender or levy a fine, the court would, by decree, compel her to performance thereof, although the husband died before it was done. But Mr. Murray observed, in the case of *Thayer v. Gould* (i), before the Lord Chancellor, Michaelmas, 13 Geo. 2., that, upon looking into the register's minutes, it appeared the court made no decree in the last case, but that it was by consent referred to Mr. Serjeant Rawlinson for his arbitration.—From this reference, however, we may fairly conclude, that there were circumstances in this case which rendered the decision of

(h) *Baker v. Child*, 2 Vern. 61. vide Com. Dig. Cha. (2 M. 6.) vol. ii.

(i) 1 Eq. Ca. Abr. 62, n. (A), [et p. 112. 386, 8vo. ed.—Ed.]

who ought not, by law, to convey by means of any compulsion from her husband. Lex. Præc. 245. We may further add, that all the text writers of the present day treat the rule to be, that the court will, in every case, feel strongly inclined to refuse a specific performance of the husband's agreement that his wife shall join him in effectually conveying the estate. See 1 Fonb. Tr. Eq. 294, n. (g), 5th edit. Sugd. Ven. & Pur. 181, 5th edit. and 1 Madd. Ch. 399, 2d edition.

Observations on
Mr. Roper's
view of the
doctrine.

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Mr. Roper, indeed, in his late excellent work on the law of property, as relating to husband and wife, conceives the authorities to establish the general proposition—that the husband will be bound in equity to perform his covenant, founded upon a valuable consideration, to procure his wife to join with him in a fine or other conveyance. “The principle,” the learned gentleman observes, “on which this rule is founded, does not appear harsh or unsound: the husband ought to know the state of his wife's mind before he enters into such stipulations; and with the exception, when it appears that the wife will not concur, and the husband can replace the purchaser in the same situation as he was previously to the transaction, it may probably be considered that the court will decree a specific performance by the husband of his covenant, that his wife shall concur with him in levying a fine. 1 Rop. Bar. & Fem. 537. Mr. Roper may not possibly have been apprised of the recent cases of *Davis v. Jones*, *Howell v. George*, and *Brick v. Whelley*, at least they are not noticed by him in the previous review of the authorities which he enters into at considerable length; and this, perhaps, may account for his difference of opinion, if, indeed, there be any, for the above exception, in a great measure, annuls the applicability of his general rule,

it doubtful at least; as, had it been clear that the court would have released the wife from the agreement, she certainly never would have submitted to an arbitration (g).

If a leasehold estate of the wife be mortgaged by the husband, the equity of redemption will belong to him, surviving her. E. R. was possessed of a lease of lands of the demise of the Dean and Chapter of Westminster for thirty-one years (k), and married H., and then he and his wife mortgaged their interest and term of years unto I. E., and afterwards, and before the day of payment, E. R. died, and H. the hus-

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Equity of redemption in mortgage of wife's leasehold estate belongs to husband surviving (H).

(k) *Young v. Radford*, Hob. 3. [pl. 5. S. C. Brownl. 29. 4 Leon. 155, pl. 285.—Ed.]

(G) Sir Thomas Sewell, M. R. in Amb. 498, stated the note of *Baker v. Child*, (ubi supra, in text) to be very loose, and passed it over without further observation. It still, however, continues to be cited as an existing authority, see *Scriv. Cop.* 263, n. 2d edit., and 1 *Madd. Ch.* 399, 2d edit. The analogous case of an imperfect fine, by reason of the death of a tenant in tail before the completion of the proceedings, (see *Wharton v. Wharton*, 3 Vern. 3. *Weale v. Lower*, ibid. 306. cited) is not exactly parallel; for there the person against whom the agreement is sought to be performed, has not individually entered into a covenant to levy a fine, and he takes the estate not as heir or assignee, on whom the ancestor's covenant may be held binding, but *per formam doni*, by title paramount the estate of his ancestor, whereas, in the case of a wife covenanting with her husband to levy a fine, and refusing after his death to complete the same, it may be argued, that by the agreement during coverture her conscience will be bound; and, therefore, that a court of equity would compel her to execute a contract which she deliberately entered into, and but for the death of her husband (an act of God), she would voluntarily have performed. But this construction of the agreement would contradict all principle, and lead to very unwarrantable consequences; and on the authority of the cases cited in the second section of the preceding note, and the general elements of the law on this subject, it is submitted, that the case of *Hody v. Lunn*, would be supported, and *Baker v. Child*, over-ruled, so far as it curtails or restrains the doctrine contained in the first mentioned adjudication, especially if the whole amount of its opposition to *Hody v. Lunn*, be combined in the learned author's inference in the text.

Note of *Baker v. Child*, too loose to be relied on.

(H) If the mortgage were made before marriage, and the mortgagee in possession, paying over no surplus rents during the coverture, and the husband doing no act to reduce the equity of redemption into possession, it may be fairly questioned, whether such equity of redemption would belong to the surviving husband, and see 1 *Inst.* 351 a. It is observable, that the instance adduced by the learned author, is the case of a legal redemption at the day, and not of an equitable redemption, but that it is conceived, would not vary the proposition with which he has headed the case.

[714 *]
If surviving husband entitled to bare equity of redemption.

band paid the money at the day in redemption of the mortgage and entered, and made his second wife his executrix, and died. And the question was, whether the executrix of the husband or the representative of the first wife was entitled to the term? and the Court of King's Bench were unanimously of opinion, that it belonged to the executrix of the husband; the reason for which was, that though the lease was at first the wife's, and that the husband was possessed in her right, so as though he had purchased the fee-simple, the lease had not been extinct, yet by the intermarriage he had full power to *alien* it, and if he survived his wife, he was to enjoy it against her executors and administrators; so here, when he survived, the condition survived to him, and restored him to the lease in the state as it should have been, if it had not been aliened.

*If wife survive,
it belongs to
her. Semb.*

But it seems, that if she survived him, the equity of redemption would belong to her; the mortgage being no alienation, except to the extent of the money borrowed (1). This seems to be a necessary inference from the case put, 1 Roll's Abr. 344, G. pl. 15. If a woman possessed of a term takes a husband, and he grants the term upon a condition, that if he, his executors or administrators, pays 10*l.*, he shall re-enter, and afterwards he pays the 10*l.*: this is no disposition, but he shall be possessed in right of his wife; for although he pays the money to redeem the term, yet peradventure he received the money for the mortgage (κ).

[715]

(I) This is certainly law beyond the possibility of a doubt. See Wing. Max. 213, pl. 12. 15.

*Distinctions as
to equity of re-
demption be-
longing to sur-
viving husband
or wife.*

(K) The distinctions on this head are well stated by Mr. Preston, in his truly useful work on Abstracts, vol. i. p. 345, thus:—"1st. If the equity of redemption be reserved to the husband and wife, the equity will belong to them. 2d. If they join in the mortgage, the equity of redemption will then also belong to them. But if the husband *alone* make the mortgage, and reserve the equity of redemption to *himself*, then the wife will be excluded; sed quære. Also, if the husband *alone* assign the term, subject to a condition, and enter for the condition broken during the *coverture*, the husband will be again possessed in right of his wife as before; and the wife being the *survivor* may be entitled, 1 Roll. Abr. 340, 1. 45, 50. But if the husband die before the condition is broken, his executors must enter for breach of the condition, and may hold discharged of the title of the wife. Wing. Max. 213, pl. 13. In this case the law is different as to freehold estates, in reference to the learning of dis-

It seems to have been formerly held, that a husband could not charge or grant away the trust of a term belonging to his wife (l). Thus where the wife had assigned her term in trust for herself before marriage, and then the husband, without the trustees joining, mortgaged the trust; afterwards, the husband being dead, the mortgagee exhibited his bill to have the land conveyed to him, or to be redeemed; and the court dismissed the bill, observing that it had been the constant practice of the Court of Chancery, to set aside and frustrate all incumbrances and acts of the husband upon the trusts of the wife's term.

Formerly held that husband could not charge or assign trust of term belonging to wife.

But the law in this respect hath since been changed (m); for it was determined in *Sir Edward Turner's case*, upon an appeal from a decree of the Court of Chancery to the House of Lords, that a term being assigned in trust for a woman by her former husband, and she afterwards intermarrying with another husband, who aliened the term, the same was well passed away, and that the husband might dispose thereof; and the Lord Chancellor Nottingham's decree was thereupon reversed (L).

Now otherwise.

(l) *Doyly v. Persall*, 2 Freem. 138. S. C. 1 Eq. Ca. Abr. 57. 1 Ch. Ca. 225. [Gilb. L. P. 282. *Sir G. Sand's case*, Hard. 448. 496.—Ed.]

7. Trinity Term, 33 Car. 2, [more fully, 1 Ch. Ca. 307.—Ed.] S. L. Gilb. Rep. Eq. 102. 1 P. Wms. 258, and *Tudor v. Samyne*, 2 Vern. 270, et vide 59; and see infra, 721.

(m) *Sir Edward Turner's case*, 1 Vern.

continuance, 1 Inst. 336 b. Litt. sec. 632. And if the husband alone, or the husband and wife, mortgage the whole term, and the husband take back the term to himself alone by re-assignment, the state of the title will be altered at law; and the wife cannot, either at law or in equity, assert a title to the term, even though she should be the survivor. When the husband regains the term by force of a condition, his old title revives, *Young v. Radford*, Hob. 3, while a re-assignment gives him the term at law under a new title; and the wife cannot assert any equity to controul the legal title." The learned writer adds, "These distinctions, though drawn on very mature consideration, are to be received with great caution." Where a mortgagee devises to husband and wife in fee, treating the property as real estate, it survives to the wife against the husband's sole conveyance. *Doe v. Parratt*, 5 T. R. 652.

(L) With his own approbation as it should seem, he having declared to the House that his judgment below was founded on mistake. See 3 Chan. Rep.

Husband may charge or assign term, held by A. B. in trust for his wife.

And in the case of *Pitt v. Hunt* (n), where the wife before marriage being possessed of a long term for years, and A. the person who was to marry her, being indebted 400*l.* to I. S., by agreement of A. and I. S., made a lease to I. S. for ten years to secure payment of the 400*l.*, the lands being then valued at 80*l.* per annum. And by indenture, sealed in presence of her husband, assigned the residue of the term to friends in trust, to be at her disposal whether sole or covert (but no other words to exclude her husband); and she brought in money and other estate to the value of 600*l.* She married. Afterwards the creditors of the husband obtained judgment in debt against him; and, on a *feri facias*, the sheriffs sold the residue of the term. The vendees had a decree against the trustees of the wife for the term; and the reason given by the Lord Chancellor was, because the Lords in Parliament had reversed a decree obtained by Lady Turner. And the Chancellor held it not fit a decree should be one way in Parliament, and in another way there: but declared it against his own opinion. And the reporter says, that the husband, in this case, forsook his wife, refused reconciliation, and allowed her nothing, &c. yet decreed *ut supra*.

Latter doctrine disapproved by Finch, C.

In the last case it appears, that Lord Chancellor Finch was much dissatisfied with the resolution of the Lords in *Sir Edward Turner's case*; for in *Vernon* it is said, he seemed to wonder at that resolution, and said it could not amount to an act of parliament to change the law; and that although, at first, there possibly was no great reason for those resolutions that the husband could not dispose of a trust for the wife made without his privity before marriage, yet, the law being so settled, people made provisions for their children, according to what the law was then taken to be, and now these provisions were defeated by this new resolution. And he com-

(n) 2 Ch. Ca. 73. S. C. 1 Vern. 18. 2 Freem. 78. Mich. Term, 23 Car. 2.

224.—Yet this can scarcely be the case, as in *Pitt v. Hunt*, ubi supra, the same noble Lord declared the reversal of *Turner's case* to be against his own opinion.

recommended the saying of Chief Baron Walker, *viz.* "It is no matter what the law is, so as it be known what it is (M)."

And a covenant by the husband that he will convey a term belonging to his wife, is such a disposition thereof as will bind her in equity. Thus where A. being a *feme sole* possessed of a long term of years, married with R., who having occasion for money, borrowed it of C., who was an under-lessee of his wife (o), and covenanted that he would grant him another lease

(o) *Stead v. Cragh*, 9 Mod. 42.

[717]
Covenant by husband to convey wife's term binding on him in equity.

(M) *Sir Edward Turner's case* is generally treated as the first determination, establishing the right of the husband to dispose of the trust term of his wife; but there is a prior case clearly acknowledging the doctrine, namely, that of *Bullock v. Knight*, 1 Ch. Ca. 265. In that case, Sir John King, for the plaintiff, objected, that the trust of a term limited to a *feme covert* was disposable by the husband, and that his alienation was binding on the wife, for that the trust of the term was of the same nature as the term itself, et per Lord Keeper, "I should not doubt if a *feme* have the trust of a term for years, and marrieth, but to decree it to the alienee of the husband, (sed quare [by the reporter] if to the alienee; but it seems it must be to execute the decree to the husband, and then the husband may alien; but the Lord Keeper said as before). When a term is settled for the maintenance and jointure of the wife, the husband shall bind the wife by his alienation." In *Saunders v. Page*, 3 Ch. Rep. 225, *Sir Edward Turner's case* was cited and approved; and notwithstanding Lord Alvanley's doubt in *Macaulay v. Phillips*, 4 Ves. 19, whether the husband can assign the wife's interest without valuable consideration, it seems to be now generally understood as settled law, that a trust term of the wife will be wholly under the husband's power. See 1 Rep. Bar. & Fem. 174. 1 Pres. Abs. 344. and 3 Thos. Co. Lit. 306. Cham. on Lea. 350. infra, 766, et seq., and *Packer v. Windham*, Pre. Ch. 419, where it was said by Lord Chancellor Cowper, that the bond, &c. was a chose in action, and not assignable at law, but a term for years was only a chattel real, which the husband might assign by law without his wife, and so he might the trust of such a term, and consequently the money secured by it.—There is, however, this distinction, which was taken and acknowledged both in *Sir Edward Turner's case* and in *Bullock v. Knight*, ubi supra, that if a term be assigned in trust for the *feme* before marriage, with the privity and consent of her intended husband, there the husband cannot intermeddle or dispose of the term. If, therefore, a term be settled by the husband on trusts for the separate use of his intended wife, no other mode of mortgaging or assigning the term will be effectual than a *fine sur concessum*, in which the wife concurs. But the term thus settled upon trusts for the separate use of the wife must, to be exempt from the husband's controul after marriage, proceed from the husband himself, or be settled with his privity before marriage, as will appear by the case of *Tudor v. Samyng*, cited by the learned author, post, 721.

Trust term of wife within husband's power, except settled to her separate use.

[717*]

of the premises, to commence after the expiration of the subsisting term, and to continue during the time he had any right, &c. and died before he had made such lease. Afterwards a question arose between an assignee of all C.'s interest and A., who survived her husband, whether the property was changed by this covenant? On the side of the wife it was contended, that the covenant was only a bare agreement between the parties, and rested in covenant, which could only charge the executors and administrators of the covenantor, and that she claimed in neither of those capacities, but by virtue of that right which she had paramount to that of her husband; but on the other side it was insisted, that the covenant was a good disposition of this term in equity, and that it was not prayed that the wife should be obliged to carry it into execution, but that the court would declare it to be a good disposition of the term in equity. And so it was decreed to be, because the husband had a power to dispose of it; and the covenant was such a lien as bound the right, in whose hands soever it went (N).

[718]

Trust of term and trust of money raiseable by term, equally within husband's power.

And there seems to be no difference in this respect between the case of a term for years in trust for a woman, and a term for years in trust to raise money for the benefit of a woman created before marriage. Thus where A. made a settlement, whereby he created a term for years in trust to raise 400*l.* a piece for his two daughters (*p*); one of them married B., and he and his wife brought a bill, and had a decree to have the 400*l.* raised and paid. But before it was raised, B. assigned the benefit of this decree in trust for the payment of his debts, and made him executor and died, leaving his wife and a child unprovided. The creditors filed a bill to have the benefit of this assignment; and though it was insisted, on the behalf of

(*p*) *Walter v. Saunders*, 1 Eq. Ca. Abr. 58. et vide S. L. Gilb. Eq. Ca. 102.

Agreement by tenant for life to grant lease, binding on remainder-man, when.

(N) See also for similar law, *Bates v. Danby*, post, 766, et seq. and *Shannon v. Bradshaw*, 1 Sch. & Lef. 52, where it was decided, that although a tenant for life, with a leasing power, do not actually grant a lease, yet if he enter into an agreement to do so, it will bind the person in remainder. On the same principle, it is presumed, the case of *St. Paul v. Dudley*, 15 Ves. 167, 173, was decided.

the wife, that there was a difference between a term in trust to raise a sum of money for a woman, and a trust of the term itself for a woman; yet the Master of the Rolls held that this was a term for years, *and not a sum of money*, and therefore not to be distinguished from *Sir Edward Turner's case*. And he said he must decree it (though against his conscience), that there might be an uniformity of judgments.

So money secured to a woman on mortgage of a term for years, or raised by sale of the wife's term in trustees, becomes, on payment, the husband's (q).

But it is said to have been agreed in *Sir Edward Turner's case* (r), that where a term is assigned in trust for a *feme covert* by the *privity and consent* of her husband, there, without doubt, the husband cannot intermeddle or dispose of it. Accordingly where a *feme sole*, being possessed of a brew-house for a term of years (s), mortgaged it, and afterwards, a day or two *before* her marriage, with the privity of her intended husband, as appeared by his being a witness to the deed, made an assignment of her interest to trustees, in trust for herself for life, and then for her son by a former husband; and afterwards married, and her husband took an assignment from the mortgagee, and then surrendered his lease to the reversioner, and took a new lease for the same term, and died. The question was, whether the husband, in this case, had power to dispose of the interest of the wife in this term for years, it being settled with the husband's privity? And it was held *clearly per curiam*, and admitted by both parties, that if a *feme covert*, with the privity of the husband before marriage, doth convey a term for years in trust for himself, that is clearly out of the husband's power, and he can neither dispose of nor release the interest of his wife; and if the wife should join in the grant, it would not mend the case.

Husband no power over wife's trust of term, created with his privity.

[719]

We may observe, that in the last case the husband was a witness to the deed; and the Lord Chancellor, in the case *He must be party to deed. Semb.*

(q) Hob. 3. March. 54, 55. *Parker v. Wyndham*, Gilb. Eq. Rep. 98, 102. (r) 1 Vern. 7. 1 Ch. Ca. 266. (s) *Draper's case*, 2 Freem. 29. Sed vide contra, 1 Rol. Abr. 343. F. 5. 7. Ed.]

of *Pitt v. Hunt*, seemed to think it necessary that the husband should be a party to the deed; for his Lordship, reprobating the resolution in *Sir Edward Turner's case*, said he thought from thenceforth it would not serve turn to have the husband's consent or privity to an assignment of a term in trust, unless he was likewise made a party to the assignment.

Secret assignment of term by wife on eve of marriage in trust for herself, void against husband (o).

And in *Draper's case* the court seemed to incline to the opinion, that if a *feme* doth secretly, without the knowledge of her husband, before marriage, convey a term for years in trust for herself, and this shall be in the power of her husband, so he may either grant or release the estate of the wife (t). And though the estate at law was wholly in the mortgagee, and

(t) Et vide 2 Ves. jun. 194.

Disposition by wife before marriage of her estate without husband's privity, a fraud on him, and void.

(O) In *Howard v. Hooker*, 2 Ch. Rep. 84, a widow, in contemplation of a second marriage, made a deed of her former husband's estate (to which she was entitled under a settlement thereof for her benefit), and married, without informing her second husband of the dispositions she had made of her property. The husband filed a bill to have this deed set aside as a fraud upon him, and it was decreed that the deed should be absolutely set aside, and no use made of it either against the said second husband, or any claiming under him. That a secret conveyance by a feme sole of her property to a stranger, on the eve of marriage, without the knowledge of her intended husband, will be deemed a fraud, see *Lance v. Norman*, 2 Ch. Rep. 41. 79, 2d edition. *Blanchett v. Foster*, 2 Ves. 264. *Cotton v. King*, 2 P. Wms. 360. *Poulson v. Wellington*, ibid. 335. *Carleton v. Dorset*, 2 Vern. 17. *Ball v. Montgomery*, 2 Ves. jun. 191. 194. *S. C.* 4 Bro. C. C. 339, and post, 757. But though if a woman, on the eve of marriage secretly convey her property, without the privity of her intended husband, it will be considered as a fraud; yet, in a case where the deed had been made in contemplation of a marriage with another person, and with the consent of that person, it was held to be unimpeachable. *Strathmore v. Bowes*, 2 Bro. C. C. 345; decree affirmed in the House of Lords, 3d March, 1789, *S. C.* 1 Ves. jun. 21, contra *Edmonds v. Dennington*, mentioned in *Carleton v. Earl of Dorset*, 2 Vern. 17. The intended husband's interest in his wife's property before marriage, is founded upon the good faith which ought to subsist inviolable in relation to so solemn a contract as that of marriage. "In strictness," says Mr. Roper, "the husband can have no right to any of his wife's property previously to the solemnization of the marriage. Before marriage, therefore, the wife is at liberty to settle or dispose of her fortune as she pleases, provided it be done with no improper motive, nor to deceive the person who is then addressing her, with a view to their union. But deception will be inferred, if after the commencement of the treaty for marriage, the wife should attempt to make any disposition of her property without her intended husband's knowledge or concurrence. The injury he would

the wife conveyed nothing but an equity in trust; yet, when the mortgagee assigned over to the husband, the husband had it under the same equity as the mortgagee had, and was just in his place, and no act of the husband could bar the trustees for the wife and her children of their equity. And it was decreed, that this new lease should be assigned over to the wife or her trustees, paying to the executor of the husband the mortgage-money.

But if a term be assigned by the husband after marriage to trustees, in trust for the wife, this is voluntary, and fraudulent against purchasers (*u*).

Voluntary assignment.

(*u*) 1 Ch. Ca. 225. *Wike's case*, Lane, 54, 55. [S. C. Jenk. 190. Ca. 92. Hard. 466.—Ed.]

sustain, if such a transaction were to be sanctioned, is obvious; for since the wife's apparent fortune, in addition to his own, may be a weighty consideration and inducement for entering into the contract, the happiness of both might be endangered, if, after the treaty began under such calculations and persuasions, the wife should be enabled, prior to the marriage, to disappoint them by disposing of or abridging her interest in the property that belonged to her. It is presumed, therefore, that without the consent of the intended husband, the law will not permit any disposition of the wife's fortune to be made before the marriage then in contemplation; and that under no circumstances after a treaty for a marriage has commenced, will any such voluntary disposition of her property be binding upon her subsequent husband. In the absence of other instances of fraud, the time when the disposition or settlement was made must decide its validity, and attention to this circumstance will, as it is presumed, reconcile the principal cases." See 1 Rep. Bar. & Fem. 160. In the *Countess of Strathmore v. Bowes*, ubi supra, Lord Thurlow expressed the rule in these words, "A conveyance by a wife, whatsoever may be the circumstances, even a moment before the marriage, is *primâ facie* good, and becomes bad only upon the imputation of fraud. If a woman, during the course of a treaty of marriage with her, make, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, (though good *primâ facie*) because affected with *that fraud*." Et vide further, Ath. Set. 320.

From this note we see the necessity of making the intended husband a party to the marriage settlement, when the wife's property is the subject of limitation; and this should never be omitted, or at least it should never be omitted to give the intended husband notice of the settlement before the solemnization of the marriage. See *Blyth's case*, 2 Freem. 97, and *Newstead v. Searle*, 1 Atk. 264. And where he is actually a party to such settlement, a court of equity will not avoid it, although he may have been an infant at the time it was made. *Slocombe v. Glubb*, 2 Bro. C. C. 545.

Intended husband should be party to, or have notice of settlement.

Term assigned by former husband in trust for widow's separate use, assignee of second husband may compel assignment of legal estate (P).

And it seems that an assignment of a term, held in trust for a *feme covert* by her husband, to a purchaser for a valuable consideration, will be binding upon her and her trustee, and that such assignee is entitled to a decree for an assignment of the legal estate to him, and that without making any settlement on the wife. Thus where A., the first husband of B., being possessed for the residue of a term of thirty-one years (x), conveyed it over to trustees for the separate use and benefit of his wife, and she married C., a second husband, who first mortgaged the term to D., and then sold it to E. A bill was filed against the wife and her trustees to compel them to assign over the legal estate, and so it was decreed; for it was said, as the husband may dispose of a term for years, where the legal estate was in his wife, so he may of the trust of a term, without the wife or the trustees joining. It was objected, that the husband, in this case, had made no settlement or provision for the wife; and that if he was plaintiff the court would not

(x) *Tudor v. Samyne*, 2 Vern. 270. Et vide *Walter v. Saunders*, 1 Eq. Ca. Abr. 58. [S. C. ante, 717, 18.—Ed.]

What equities of wife husband may assign.

(P) See ante, p. 715, 16, in notis. The point, whether the equity of the wife can be barred, or affected by the husband's assignment for a valuable consideration, was once much questioned, but Lord Northington, in *Salisbury v. Newton*, 1 Eden, 370, held, she was entitled to a provision in such case; and Sir Lloyd Kenyon, M. R. said, the more he thought upon the subject, the more he was satisfied that such an assignee must be subject to the same equity. *Roberts v. Roberts*, 2 Cox, 422. Lord Alvanley admitted, that Lords Hardwicke and Thurlow intimated difficulties, whether an assignment for a valuable consideration might not support the right of the assignee, or at least evade this equity; but he observed, "I have looked into almost every case, and have never seen it determined that any such equity does exist in favor of the assignee." Like *v. Beresford*, 3 Ves. 511, 512; and see *Pryor v. Hill*, 4 Bro. C. C. 139. *Pope v. Crashaw*, ibid. 326. *Worrall v. Marlar*, 1 Cox, 158; and *Bushnan v. Pell*, 1 P. Wms. 459, n. Sir William Grant seems to have thought there were some cases very difficult to reconcile with Lord Alvanley's proposition; for that there was hardly any other ground upon which Lord Hardwicke proceeded in some of the cases. In the instance before his Honor, an assignment by a husband of dividends of stock, in right of his wife, to the amount of 100*l.* a-year, out of 260*l.* per annum, was held good, though a doubt was expressed what would have been the effect, if the whole of the stock had been assigned. *Wright v. Morley*, 11 Ves. 12; and see, for Lord Hardwicke's cases, *Grey v. Kentish*, 1 Atk. 280. S. C. 2 Dick. 494, and post, 763. *Bates v. Danby*, 2 Atk. 208; and see also *Carteret v. Pascal*, 3 P. Wms. 199, before Lord King.

decree the trustees to assign to him, without making some settlement on the wife; and the plaintiff who derived under the husband could not be in a better condition—*sed non allocatur*.

And the latter objection seems, in the case of *Pitt v. Hunt* (y), to have been considered as entitled to no weight in such case, even in respect of general creditors claiming such *term*.

Although, during coverture, any alienation of the wife's estate of inheritance, either by the wife alone, or by the husband and wife, without a fine levied thereof, be void after his death; yet a wife may, by any acts done by her which amount in law to a *new grant or a re-execution*, give it a validity. Thus, where a mortgage, in the form of a lease, had been granted of a *feme covert's* estate by the husband and wife (z), and, after the husband's death, the deed being in the hands of the mortgagee, the wife had directed the tenants in possession to attorn to the mortgagee, had settled with him for the balance of the rents, styling him mortgagee, and had not questioned his possession for a number of years; the court of King's Bench were all of opinion, that the conveyance in this case, though in the form of a lease, was in substance a mortgage; and not being within the reason for which leases by a *feme covert* were held to be only voidable, was absolutely void on the death of the husband; but that the acts done by the widow, the deed being in the possession of the mortgagee, were tantamount to a re-delivery, which, without a re-execution, was equivalent to a new grant (q).

[722]
Mortgage of wife's estate void by husband's death, made good by subsequent acts of widow.

(y) Vide ante, 715. 16.

Bartholomew, 2 P. Wms. 127, ante, 704.

(z) *Goodright v. Strathan*, 1 Doug. Et vide 1 Ch. Ca. 255. *Archer v. Rep.* 53, n. (17). *S. C.* Cowp. 201. *Pope*, 2 Ves. 523. *Dyer*, 916, pl. 13, Et vide *Doe v. Weller*, 7 T. R. 478. contra as to a lease. Perk. sect. 154. *Drybutter v. Bar-*

(Q) This judgment is said to be founded on Co. Litt. 36 a. 2 Roll's Abr. *Goodright v. Strathan and Drybutter v. Bartholomew compared and distinguished* and Perkins. See 1 Ves. jun. 31. The following passage from Perkins, sect. 154, was cited by Lord Mansfield:—"If a married woman deliver a bond unto me, or other writing, as her deed, this delivery is merely void; and, therefore, if after the death of her husband, she being sole, deliver the same deed again unto me as her deed, the second delivery is good and effectual."—

Wife's estate
mortgaged by

If a *feme covert* join in levying a fine to secure a mortgage

The simple question then was, whether the acts done amounted to a second delivery of the mortgage deed? It appeared in evidence that after the death of the husband, the wife, by three different papers under her hand, had acknowledged the mortgage, which papers were exhibited in court, and much relied on as a confirmation of the deed in question. "Delivery," remarked the Noble Lord, who pronounced the unanimous opinion of the court, "is a matter in *pais* only. The mortgage deed is in the hands of the mortgagee: the wife, after the death of her husband, the mortgagor, surrenders possession, under her own hand, to Saunders and Smith, the executors of the mortgagee, and orders the tenants to attorn to them as executors of the mortgagee in terms." This, Lord Mansfield thought, was a clear acknowledgment by the wife that the deed was her's, and that she was content the defendants should enjoy according to the terms of the deed. Therefore, added his Lordship, "we are all of opinion for the defendants, that these facts were a confirmation of the mortgage, upon the ground of their being equivalent to a re-delivery of the deed."—The obvious objection to this judgment is, that it appears to be in direct opposition to the well known rule of law, that a deed, which is void (as distinguished from a voidable deed merely), cannot be made good by confirmation, and here the court of King's Bench first declares the mortgage to be void, and then holds it confirmed by re-delivery. Lord Hardwicke has said, that if an obligation be void at law, no new agreement can make it better; the original corruption will affect it throughout. *Chesterfield v. Jansen*, 1 Atk. 354. And it is observable, that in the prior case of *Drybutter v. Bartholomew*, 2 P. Wms. 127. S. C. ante, 705, in the text, receipt of profits and payment of interest by the widow, were not allowed to confirm the title of the mortgagee. By reference to that case, we find that the husband, in right of his wife, was seised in fee of a share of the New River Water, and they joined in a mortgage for 1000 years by deed without fine, reserving a pepper-corn rent. The husband died, and then the widow received the profits, and paid the interest. The mortgagee filed a bill to foreclose, and insisted that payment of interest by the widow confirmed the lease. But the Master of the Rolls dismissed the bill, admitting, that if a rent had been reserved, the acceptance of it would have confirmed the lease. Between these cases this shade of difference may be drawn, that in *Goodright v. Strathan* the lease, during coverture, was delivered as an escrow, or rather that it was merely prepared during coverture, and duly executed by the wife, when sole; whereas in *Drybutter v. Bartholomew* it did not strike the court that there were sufficient acts after marriage to warrant it in saying that the lease had been virtually re-delivered, but if acceptance of rent be equivalent to a re-delivery of the deed, certainly payment of interest must be taken to be equivalent to a re-delivery also.

Being contra-
dictory, which
to be preferred?

The court, it is submitted, has considerably embarrassed the doctrine by placing the case cited in the text on a wrong ground. Instead of declaring the deed void, which it certainly was not, it might have said that it was voidable only, and that the facts proved amounted to a confirmation. Delivery is of the essence of a deed, and if that could be proved *aliunde*, a wide door

on her estate, which mortgage afterwards becomes forfeited; *fine, husband pays off part of*

would be open to fraud and perjury. The cases of *Drybutter v. Bartholomew*, and *Goodright v. Strathan*, are clearly contradictory authorities. The question then arises, which is now to be considered the binding adjudication. It is no reconciliation to say that one case was decided at law, and the other in equity, for then the parties may sue at law or in equity, as their wishes preponderate. This question will be best answered by adverting to the distinctions taken in the books between void and voidable leases; and as a preliminary and leading remark, it should be kept in view that void leases do not admit of confirmation. 1 Pres. Abs. 337. Leases by husbands and wives are of two kinds, the first, those which are made at common law, and the second, those which are made under the statute 32 Hen. 8. c. 28. The former species of lease is the subject to which our present observations will be confined. Et vide 1 Stark. Evid. 332, part 2. Harr. Evid. 92.

Leases by *parol* of the wife's freehold estate, made by the husband, are leases at common law, and are good only during the life of the husband; and after his death they are void *ab initio* against the wife, and those claiming under her. *Walsall v. Heath*, Cro. Eliz. 656. To make these leases capable of enduring beyond the coverture, or the life of the husband, they must be in writing, and then they are voidable only against the wife and her heirs. Bac. Abr. tit. *Lease*, (C). The reservation of rent, or the concurrence of the wife during the coverture, will be immaterial so long as it remains at the common law; for, as she has no present right to contract, it cannot deprive her of what she does not possess; and it has no tendency to bar her of a right which may accrue to her in case she survives her husband. If the lease be made by indenture, or deed poll, the law will allow her to affirm or avoid it, as she finds it most subservient to her own interest; if she choose to avoid it, it will be absolutely void, so that she may plead "*non demisit*," because no interest passed from her, and the lessee will be in merely by her husband's contract. The same power of election will descend to her heir or issue by a former marriage, as matter of privity; but if the husband be entitled to be tenant by the curtesy, the issue cannot avoid it during the lifetime of the husband. Bro. tit. *Accept*, 6, 10. tit. *Lease*, 24. *Jordan v. Wilkes*, Cro. Jac. 382. 2 Ander. 42. Co. Litt. 45 b. Plow. 137. *Jackson v. Mordaunt*, Cro. Eliz. 112. Hutt. 102. So if the wife join in such lease for years by indenture, if the same be not made pursuant to the stat. 32 Hen. 8. c. 28, she will be at liberty, after her husband's death, either to affirm it by acceptance of rent, or to dissent to or avoid it, by bringing an action of trespass against the tenants in the same manner as if she had been no party thereto; for her joining during the coverture, when she was not *sui juris*, but under the power of her husband, will not bind her after his death. *Wilson v. Riche*, Yelv. 1. Et vide Roll's Abr. 350. Cro. Jac. 563. 617. Cro. Car. 165. Cro. Eliz. 769. It is also a principle universally acknowledged, that acceptance of rent by the widow will affirm a voidable lease, see Bac. Abr. tit. *Lease*, (C); and that a feme covert, though not bound by her agreement during coverture, yet acting according to the agreement when a widow, will be bound by it. *Maynard v. Moseley*, 1 Ch. Ca. 253. *Paclet v. Delaral*, 2 Ves. 662. *Milnes*

Void and voidable leases distinguished.

[724]

money, estate
liable to like
sum borrowed
(22).

she will not only be liable to the payment of the original sum borrowed, but if part of that sum be paid off, and then a like sum taken up, that debt will also attach upon the estate.

(22) [So if the whole money were paid off by the husband, and afterwards another sum of equal amount borrowed and charged on the wife's estate by the husband alone, such charge, it is apprehended, would be binding on the wife, without her con-

currence; and see *Astley v. Tankerville*, cited *infra*, p. 726, 7. Hence, it should seem that the concurrence of the wife in an assignment of the mortgage, with which by fine she has incumbered her estate, will not be necessary.—*Ed.*]

v. Busk, 2 Ves. jun. 488. *Whistler v. Newman*, 4 *ibid.* 129; see also *Sperling v. Rochfort*, 8 *ibid.* 175. *Cheeslyn v. Smith*, *ibid.* 183. *Nantes v. Corrock*, 9 *ibid.* 188. *Jones v. Harris*, *ibid.* 486, 497. *Wagstaff v. Smith*, *ibid.* 520; and *Richards v. Chambers*, 10 *ibid.* 580. If the lease be made according to stat. 32 Hen. 8. c. 23, it continues during the term, notwithstanding the death of the wife; and though her heir is entitled to the rent, he cannot enter or eject. *Hill v. Saunders*, 2 Bing. 112. In this case it was held, that a husband cannot sue for arrears of rent after the death of his wife. So where a limitation was to A. for life, with remainder to trustees during his life to preserve contingent remainders, with remainder to the heirs of the body of A., and A. made a lease for three lives, with livery of seisin, it was held that the lease was void as against the issue in tail under the stat. 32 H. 8. c. 28; for A. had only an estate for life in possession, and that estate could give the lease no longer continuance than that of the life of the lessor. It was true he had a vested estate tail in remainder, but the power he had by virtue of that remainder did not enable him to make a discontinuance, it being a general rule that none shall make a discontinuance but he who is seised of an estate tail in possession. *Doe v. Jones*, 1 Barn. & Cress. 238. *S. L. Trevilian v. Land*, Cro. Eliz. 56.

Lease by tenant
for life void at
his death.

But a lease by a tenant for life is absolutely void at his death, and will admit of no confirmation. Thus, in *Doe v. Archer*, a tenant for life leased the premises in question for twenty-one years, and before the expiration of that term died, the trustees of the remainder-man, who was then an infant, continued to receive the rent reserved, and the remainder-man himself, on coming of age, sold the premises by auction; in the conditions of sale, the premises were declared to be subject to the lease, and in the conveyance to the purchaser, the premises were referred to as in the possession of the lessee; and in the covenant against incumbrances the lease was excepted. The purchaser made a mortgage, and in the mortgage deed the like notice was taken of the lease, and the mortgagees for some time received the rent reserved. Notwithstanding this uniform acknowledgment of the lease by all the parties, it was held that the lease expired with the interest of the tenant for life, and that the notice since taken of it did not operate as a new lease. 1 Bos. & Pul. 531.

Reasons for
supporting case
in text.

These particulars being premised, we proceed to apply them to the conflicting cases under consideration. In *Goodright v. Strathan* the husband and wife

Thus, where baron and feme, having occasion to raise 400*l.* (a), levied a fine of the wife's land, and made a mort-

(a) *Reason v. Sachererell*, 1 Vern. 41.

make a mortgage for years, without fine or other assurance on record, whereby the estate of the mortgagee was rendered voidable only and not void, and as such capable of being confirmed by the wife surviving, which we find she does by three separate acknowledgments under her own hand. It is obvious, therefore, that the determination in this case can be referred to a substantial basis, without resorting to the remote and inapplicable argument from Perkins. And if it be true, as stated by the counsel, argo in *Clinton v. Hooper*, 1 Ves. jun. 177, that the principle of *Goodright v. Strathan* has always been much doubted, it is submitted that on an attentive review of the case, that doubt will prove to be without foundation.

On the other hand, many reasons present themselves for seriously suspecting the accuracy of the decision in *Drybutter v. Bartholomew*. That case turned on the non-acceptance of rent. The Master of the Rolls admitting, that if rent had been received, the acceptance of it would have confirmed the mortgage; but a mere nominal pepper-corn being made payable, which had never been received, his Honor declared that the lease expired with the death of the husband, notwithstanding the subsequent payment of interest by the widow. The reasons for questioning this decree are these:—In the first place, the wife having joined in the lease, it was not void, but voidable merely;—secondly, the law would have been the same, whether any rent had been reserved or not;—and, lastly, the same reason which would have made the acceptance of rent a confirmation, applies equally to the fact of the payment of interest; for as the widow was not liable to the debt, yet if she paid the interest of it, that circumstance must be considered as an acknowledgment of the debt affecting her estate, and consequently as a confirmation of its accessory, the charge and security, and the adoption of them as her own. See also 1 Rep. Bar. & Fem. 138, for a similar view of the case.

Decree in Drybutter v. Bartholomew doubted.

[725*]

It is conceived, therefore, that notwithstanding the case of *Drybutter v. Bartholomew*, payment of interest by the widow upon a debt charged on her estate by her husband, would be considered as a confirmation of the security, provided the mortgage be for years; and if the mortgage be in fee, no substantial argument occurs for a different statement of the rule. The authorities seem to concur in allowing the husband a power to transfer the whole estate of inheritance of his wife, subject only, at this day, to the right of entry of the wife, or her heirs; for even when he discontinues the estate of his wife, the injury may be redressed, and the estate re-vested by entry of the wife, or of her heirs. In the mean time the estate of the wife will be in the alienage of the husband; for the statute of 32 Hen. 8. c. 28. s. 6, did not restrain the extent of the power of alienation by the husband; it merely changed the remedy from an action to an entry. According to some authorities, indeed, a grant by him alone, not creating a discontinuance, will determine on his death, and unless he be entitled to be tenant by the curtesy of England, even on the death of his wife. But there are other authorities which treat the alienation

Widow confirms mortgage of her estate by paying interest.

gage for the same; and after the mortgage was *forfeited*, the husband paid in part of the mortgage-money, and then borrowed as much money more of the mortgagee as he had paid in before: it was decreed, [by Finch, Chancellor,] that the mortgagee, having the estate at law in him by the forfeiture of the mortgage, should hold the land against the heir of the wife until the whole money was paid; and that if the heir would not pay in the whole, principal, interest, and costs, he should be foreclosed.—But in another report of this case, it is said, that the first money paid off, *viz.* the 200*l.* (b), was indorsed on the mortgage-deed, and that the wife, in presence of the husband, made account of what was due on the first and second loan, both being, by agreement, lent on security of the mortgage (R).

[726]
*Wife's estate
 not liable be-
 yond sum ori-
 ginally bor-
 rowed.*

But no case has yet occurred in which it has been determined, that where the husband and wife join in a mortgage of her estate, that he shall by his own indorsement charge the estate beyond the sum originally borrowed (S).

(b) 2 Ch. Ca. 98.

of the husband alone as voidable only, and not void, so that the wife or her heirs must enter to defeat the estate which he had granted; which latter authorities have the greater share of credit at this day. See 1 Pres. Abs. 335. Supposing then the husband's alienation to pass his wife's inheritance, subject merely to her disaffirmance of the grant when discoverd, the mortgage in fee as against the wife and her heirs, will be voidable only, and as such capable of confirmation by the same means as have been suggested will confirm a mortgage for years. The preceding observations are addressed principally to the case where the wife *joins* in the mortgage during coverture; but supposing the mortgage of her estate to be made by the husband *alone*, the same remarks will, it is apprehended, be equally suitable.

(R) By Reg. Lib. 1681, B. fol. 409, it appears that an indorsement was made on the mortgage-deed, and *subscribed by baron and feme*, whereby they agreed that the land should stand charged with the money; and that the wife, with the consent of the husband and other parties interested, made a will, and devised the lands in question to her daughter and her heirs, to be sold for the payment of her debts, and the plaintiff's debt in particular. See Mr. Raithby's edition of Vern. vol. i. p. 41, n. (1).

[726 *]

(S) And on principle, it is conceived that no case can occur in which it shall be held, that the husband has a right to charge his wife's estate beyond the sum originally lent.

But if the money borrowed on mortgage of the wife's land be for her husband's use (c), his personal estate shall be first applied in discharge thereof; for the mortgage *being originally the debt of the husband*, his personal estate is the primary fund to pay it; and the wife, by consenting to charge her lands with it, does not make it less the husband's debt than it was before.

Wife mortgages her estate for husband's use, his personal estate first liable to mortgage.

Thus, where a husband, seised in right of his wife, borrowed 500*l.* to supply *his* occasions (d); for securing which, he and his wife levied a fine of her inheritance, and raised a term of 500 years, which was limited to the person lending the money, with remainder to the wife in fee, to be void nevertheless upon payment of the money borrowed with interest; in the deed, the husband covenanted to pay it off. Afterwards the husband made his will, by which he gave several charities out of his personal estate, and then died, without having discharged the mortgage, indebted by simple contract. The assets not being sufficient to pay the mortgage-money, and also the charities given by the will, the widow exhibited her bill to have the former discharged out of the husband's personal estate. And so it was decreed; for his personal estate would be liable to pay debts, before legacies, though left to a charity, they being still but legacies (T). †

Though it be bequeathed to a charity.

(c) 1 Ves. jnn. 186, 7.

fra, 727. *Astley v. Earl of Tankerville*,

(d) *Tute v. Austin*, 1 P. Wms. 264.

3 Bro. C. C. 545, and *Baggot v. Oughton*, 1 P. Wms. 347. [S. C. post, 929,

S. C. 2 Vern. 639, et vide *Pocock v.*

and S. P. *Incedon v. Northcote*, 3 Atk.

Lee, 2 Vern. 604. *Partericks v. Pawlet*, 2 Atk. 384. Amb. Rep. 150, in-

436.—Ed.]

† Part of this page has been transferred to page 732, post.

(T) This case was affirmed in Dom. Proc. 1 Bro. P. C. 1. The material parts of the decree are fully stated by Mr. Cox, in his note to 1 P. Wms. 264, et vide *Pawlet v. Delaval*, 2 Ves. 663. 669. In this latter case Lord Hardwicke said, there were several instances where wives had concurred to pledge part of their separate property for a debt of their husband's, and the court never said that the security should not take place, but had held it to stand as a pledge—the husband nevertheless to exonerate.—The rule is, that the title of the wife to exoneration is precisely similar to that of the heir. Thus, in the case cited in the text, though it was not the question in the cause, and consequently the judgment of the court did not appear to have been weighed in

Wife's right of exoneration similar to that of heir.

Husband's covenant to pay money, exonerates wife's estate,

So where A., and B. his wife, made a mortgage of the wife's estate, and the husband covenanted to pay the money, but the equity of redemption was reserved to them and their heirs; the

argument, yet the court declared, that clearly the wife could not insist upon being paid against onerous creditors, but should be postponed to such creditors; and that the debt, being originally the debt of the husband, his personal assets were bound to pay it in the first instance, the wife being entitled to have her estate so exonerated, not upon any right she might have, but upon the idea of its being the husband's debt; et vide 3 Bro. C. C. 211. But since the heir claims the estate from the ancestor who contracted the debt, and the wife claims her estate by a paramount title, and not under her husband, and therefore not liable to any of his debts, the liability of the one to payment of the ancestor's debts, and the exemption of the other from the discharge of any of them can be readily comprehended. Thus, in the case of the heir;—if the mortgagee were paid his debt out of the ancestor's personal estate, and that fund were insufficient to pay the other debts, the unsatisfied creditors might recover out of the real estate in mortgage what had been taken by the mortgagee from the personal funds, by being permitted to stand in the mortgagee's place, and to make use of his security; the real as well as the personal estates having been the property of the deceased ancestor, the debtor; see ante, vol. i. 343, and post, 1014. But in the case of the wife;—as the estate in mortgage for the husband's debt was not *his*, but *her* property, and therefore not liable to his debts, this circuitry cannot take place; and accordingly Lord Hardwicke, in *Robinson v. Gee*, 1 Ves. jun. 252, in allusion to this point, expressed himself thus:—"It is a common case for a wife to join in a mortgage of her inheritance for a debt of her husband: after his death, she is entitled to have her real estate exonerated out of his personal and *real* assets, the court considering her estate only as a *surety* for his debt, and none of *his* creditors have a right to stand in the place of the mortgagee to come round on the wife's estate." On this principle also arises the difference between the heir and the wife, in respect of general legatees—the wife's right to exoneration is preferred to the right of general legatees, to be paid out of the residue of the assets; whereas, legatees, as well as creditors, are permitted, as against the heir, to stand in the mortgagee's place." See also Bunb. 137. *Lutkins v. Leigh*, Forr. 53, and *Rider v. Wager*, 2 P. Wms. 329. 335.

And continues, though wife pays interest after husband's death, as his representative.

In another case, Alice Dewlnrst and her husband mortgaged Alice's estate; and a fine, in pursuance of a covenant in the mortgage deed, was levied as a security to the mortgagee. The money was for the use of the husband; the husband covenanted to pay the money, and gave the usual bond; the proviso for redemption was, on payment by the husband or his representatives. The husband died in 1794, having devised some real estates, but intestate as to his personal property. His widow took out administration to him, and during his life, paid the interest of the mortgage. She died in 1797, having devised the mortgaged estate to the plaintiffs; who, for some years, continued to pay the interest of the mortgage. The bill was for redemption of the premises, and it brought the devisees of the husband before the court, praying, that they might pay, out of the husband's assets, the principal and interest

husband died, having made his executor (e). And the question was, whether the mortgage-money should stand charged upon

(e) *Pocock v. Lee*, 2 Vern. 604, [supra, 726. And see as to the effect of husband's covenant in a similar case, *Heron v. Newton*, 9 Mod. 12, post, 876, 7. *Pitt v. Pitt*, 1 Turn. 180.—*Earl of Oxford v. Lady Rodney*, Ed.]

dne on the mortgage, and also the sums which had been paid by the plaintiffs, to keep down the interest, since the death of Alice Dewhurst.

P. 727
continued.

Mr. Ronpel, for the defendants, was obliged to admit, that the equity of redemption was in the wife and her heirs: but he contended, that the wife by paying the interest of the mortgage debt, after her husband's death, adopted the debt and made it her own, and that her devisees took the estate charged with this burthen.

The Vice-Chancellor:—The wife might have made the debt her own; but she did not act that can be so interpreted. As personal representative of her husband, it was her duty to keep down the interest, if she had assets in her hand; and, if she had no assets, still, for the sake of her estate, it was necessary for her to pay the accruing interest.—The decree was according to the prayer of the bill, an inquiry being directed as to the assets of the husband which came into the hands of the wife. *Wilkinson v. Beale* MS. before the Vice-Chan. 27th Jan. 1823.

It is also observable, that the wife's right of exoneration will continue, although the original debt be discharged by the husband, if he borrow another sum on the same security; and it is necessary also to remark, that the husband cannot by any direction in his will, ordering his personal estate to be applied in payment of his debts, except mortgage debts, exempt the application of that fund from the exoneration of his wife's estate. Thus, in *Astley v. Tankerville*, 3 Bro. C. C. 545, the wife's estate being in strict settlement, with the ultimate limitation to her and her husband in fee, with a power for them to revoke the old, and appoint new uses, they mortgaged the premises for 500 years to secure 3000*l.* with a reservation of the equity of redemption to the husband, or such other persons to whom the freehold and inheritance should belong. The mortgage having been paid off, the term was assigned by deed in trust for such uses as the husband should appoint; and in default, to attend the inheritance; but the wife was not a party to the deed. The husband afterwards borrowed 3000*l.* upon security of the estate, and by his appointment, the term was assigned for the benefit of the mortgagee, and the husband covenanted for payment of the money. He then made his will, and ordered that his personal estate, not otherwise disposed of, should be applied in payment of his funeral expences, debts, and legacies, except such debts as were secured upon and might affect any of his estates in A., &c. whereof he was not seised in fee-simple (meaning the wife's estate in mortgage.) Lord Thurlow was of opinion, that the 3000*l.* was the husband's debt, and that his assets should exonerate the wife's estate; his Lordship therefore dismissed the bill which was filed to subject her estate to the payment of the debt, but without costs.

Or though debt be discharged by husband, if he borrow another sum on same security.

Husband cannot exempt his personal estate from wife's right of exoneration.

the land, or the land be exonerated out of the husband's personal estate? *Et per curiam*, the husband *having had the money*, is in equity the debtor, and the land is to be considered but as an additional security (v).

except there be settlement.

But if there be a settlement made either before or after marriage (g), and then such mortgage or security, the husband will not be answerable to the wife's estate for the money borrowed (x).

Or it be wife's debt contracted dum sola (y).

So if the money borrowed were to pay off a debt due from the wife *dum sola*, the husband's assets would not be liable.

(g) *Lewis v. Nangle*, Amb. 150. 2 P. Wms. 664, n. (1). [S. C. 1 Cox, 240, et infra, 874.—Ed.]

(U) The paragraph beginning, "If a wife, &c." and ending, "at the day," which, in the fourth edition of this treatise, was evidently misplaced as following the above passage here, has been transferred to page 732; where, it is conceived, it may be appropriately introduced.

No exoneration if security can be connected with settlement of estate on wife's marriage.

(X) The rule to be deduced from the case cited is, that if from the nature and circumstances of the transaction, it appears, or can be inferred to have been the intention of the parties, that the wife's estate should be solely liable to discharge the whole sum borrowed, as in the instance of the mortgage having relation to the settlement of the estate by the agreement of the parties upon the marriage; there, since an inference may be drawn that such agreement extended to the subsequent mortgage, and that it was stipulated that the sum to be borrowed should be charged upon and borne solely by the settled estate, such a case will form an exception to the general rule, and exempt the husband's estate from the wife's general equity. On this principle Mr. Roper suggests, that the cases of *Lewis v. Nangle* and *Kinnoul v. Money*, (which are generally considered as contradictory authorities) may probably be reconciled. See 1 Rop. Bar. & Fem. 146. The cases are cited in the text and notes, post, 873, 4.

Rule inapplicable to cases where wife's estate is subject to her ancestor's debt, or money borrowed, is appropriated to her separate use.

(Y) In like manner if the estate descend to the wife charged with the mortgage of her ancestor, the rule entitling the wife to exoneration will not apply. In *Baggot v. Oughton*, 1 P. Wms. 357, land descended to the wife subject to a mortgage; the mortgage was assigned, and the husband covenanted to pay the money to the assignee. It was decided, that as the debt was not the husband's, his personal assets should not exonerate the wife's estate; and the covenant was considered as an additional security only for the satisfaction of the lender of the money. The decision in this case of *Baggot v. Oughton*, is said to have been affirmed in the House of Lords; but the case is not in Brown; and Mr. Sugden has said, that after a diligent search, he has not been able to meet with it amongst the printed cases of that period. See Trea. on

Nor would it make any difference in these cases that the husband gave bond for the payment of the money and performance

Pow. p. 571, 2d edit. The case however is cited with approval in *Pitt v. Pitt*, 1 Turn. 183.

In that case a feme sole made a mortgage of a leasehold house for the residue of a term of ninety-eight years and afterwards married. The husband and wife, at the request of the mortgagee, then concur in a transfer of the mortgage, subject to redemption on payment by the husband and wife, their executors, &c. The husband covenanted to pay the money. During the coverture several payments were made by the husband out of his own property, which effected a considerable reduction of the mortgage money, so much so, that only seventeen guineas remained due at his death. By his will he bequeathed this leasehold house to his wife for life and after to his children absolutely. The wife claimed the house by survivorship, and filed her bill to be let in to redeem on paying the residue of the mortgage money. For her it was contended that the husband had not done any sufficient act to make the term his own, nevertheless he had power to do so, and having that power he was to be considered as having an absolute interest in the term, and consequently that his liquidation of the incumbrances on the estate was an exoneration for the benefit of the wife surviving, whose claim by survivorship he failed to extinguish. The children did not persevere in resisting the right of the plaintiff to redeem, or in insisting as they did by the pleadings, that acts were done by the husband in his life-time sufficient to reduce this chattel into possession: but they contended, that admitting no act was done by the husband sufficient to reduce this chattel into possession, there was still an equity on the part of his estate, to be reimbursed the payments made in his life-time in reduction of the mortgage debt. *Per Curiam*. In this case the husband had not the absolute interest in the property, he was not sure that it would become his own, but it may be fairly inferred from his will that he had persuaded himself that it was his own; his will leads one strongly to believe that there was an impression upon his mind that he had done sufficient to render this, which was once the chattel of his wife, his own; if he had survived he would have had it absolutely, but he dying in the life-time of his wife she became entitled; the question is, what, under these circumstances, is the true equity? It is said, that by the marriage the wife's debt was transferred to the husband, and in the next place that he has by covenant imposed upon himself the obligation to pay. With respect to the last point the case of *Baggot v. Oughton* shews that the covenant to pay is not decisive, that case is not exactly similar to the present, because there the question was, whether payment of the mortgage money out of the husband's assets could be compelled; here the party is filing a bill to redeem, and it is insisted, that coming to redeem she ought to do equity and consider what her original right was, and that it was by her husband's acts this mortgage money was reduced. The court therefore thought there was sufficient to authorise it to say, that the children should be permitted to have the benefit of the sum which the husband had paid out of his own estate, and that the redemption ought to be upon the terms that the children be permitted to stand in the place of the mortgagee for the

Or to her own mortgage debt before marriage.

of covenants; for although the creditors may sue him upon such bond at law, a court of equity will relieve him, by ordering him to be paid out of the wife's estate, which is the *primary fund* to discharge her debts (*h*).

Whether money borrowed for use of husband or wife, proveable by parol.

And it seems not necessary that it should appear upon the face of the deed by which the mortgage is created, for whose use the money was borrowed, that may be proved *aliunde*. Thus, in the case of *Lord Kinnoul v. Money* (*i*), the position is laid down, that parol evidence is admissible to prove that the debt, which the husband contracted to pay, was the debt of another, not his own; consequently that his personal estate was not to be charged in favor of the heir or wife. And Lord Loughborough, Chancellor, in the case of *Clinton v. Hooper* (*k*), is reported to have said, applying his observation to a case put *arguendo* by the Solicitor-General, that if the money raised by a mortgage of the wife's estate were paid to

(*h*) *Lewis v. Nangle*, Amb. 150. Vide etiam as to parol evidence, 2 P. Wms. 664. n. (1). 885, 6.—Ed.]

(*i*) Cited per Lord Chan. [1 Ves. jun. 186. S. C. 3 Bro. C. C. 211. 2 P. Wms. 664, note, and post, 873, 4. (*k*) 1 Ves. jun. 186, 7. S. C. 3 Bro. C. C. 201.

amount in which the husband had reduced the debt. *Pitt v. Pitt*, 1 Turn. 184.

Or, whether money borrowed is appropriated to her separate use.

It is further observable, that according to Lord Thurlow's opinion in *Clinton v. Hooper*, 1 Ves. jun. 188, it should seem, that if the money borrowed upon the wife's estate were paid or transferred to her with her husband's privity, so that she might dispose of it as she pleased, and instead of spending she preserved it, and had the power of disposing of it by will as if she were unmarried; then, although the court would not infer an equitable assumpsit, contrary to the tenor of the obligation subsisting between husband and wife, who cannot contract with each other without the intervention of trustees; yet, as she had sole controul over the money, and it never was the husband's during her life, the principle that the debt was not the husband's would apply, and therefore, would exempt his estate from exonerating the security affecting his wife's estate under the above circumstance: and, that if, by a distinct transfer and independent transaction, without any relation to the original matter, she gave the money to her husband, that circumstance would not probably reach back to the original contract, so as to make the husband the original debtor, and to ground the wife's right to exoneration, upon the principle, that payment having been made to the wife was, in the common legal sense, payment to her husband. Et vide 1 Rep. Bar. & Fem. 145, et seq.

the wife, without writing and with the privity of the husband, and it were made out satisfactorily to the court that she could dispose of it as she pleased, or suppose she kept it herself, so as to be able to make a will, &c. with all the consequential rights of personal estate; he saw no reason, why the court should not, proceeding upon the same principle, declare that the money was not the debt of the husband. It being transferred to her, and so as to be attended with all the equitable consequences of separate estate, it never was his, so the whole obligation upon him would consist in his covenant.

But Lord Loughborough, Chancellor, in the case to which allusion is last made, thought that *parol* evidence of a *declaration* of the wife, who had subjected her estate by joining in a mortgage, that it was meant to be a gift to the husband, was not admissible. When it was a transaction purporting, not only by the instruments themselves, but by all the other evidence, except *parol* evidence, to be a transaction to raise money for the husband, and he therefore bound to pay; his Lordship had great doubts, whether it was possible to apply *parol* evidence, to that transaction itself, to prove it different. If the evidence were, that the wife's debts were paid by it, or if any application different from paying it to him, his Lordship saw no reason against admitting her *parol* declaration to that extent. But when he said *that*, he went far beyond all the cases, which were, where the fact was proved, that the money was paid to another account, and never did come to the husband's account, because it never was received by him at all.

But parol evidence of wife's declaration that in joining in mortgage she intended it as a gift to her husband, inadmissible.

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And where the wife had a right to be exonerated out of the assets of her husband in respect of money raised by mortgage of her estate (1), and received by him, she was held to have barred herself by *telling* the executor that she did not mean to claim this right, and desiring he would proceed in paying the legacies; and *parol* evidence was admitted of her declaration to this effect.

Declaration by wife to husband's executor, that she waives right to exoneration, binding

(1) *Clinton v. Hooper*, 1 Ves. jun. 173.

Exoneration postponed to debts, but preferred to legacies.

It was said in the case of *Tate v. Austin*, that all other debts of the husband should be preferred to the debt due to the wife (m), [but it was declared, that the wife's estate should be exonerated out of the husband's personal estate before the payment of legacies given by his will (m m)].

Substitution not allowed.

If the wife receives satisfaction out of the personal estate of the husband (n), none of his creditors have a right to stand in the place of the mortgagee, as against the real estate of the wife.

Wife not deprived of redemption by vague words in assignment of mortgage.

Vague words, in a subsequent assignment, importing an assent from the wife, that, on redemption, the estate should be re-assigned in such manner as either the husband or wife should appoint, will not alter the nature of the debt, or carry the estate to the husband.

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Thus, where Theophilus Earl of Huntingdon, and the Countess Elizabeth his first wife (o), mother of the plaintiff, on the 1st of August, 1682, joined in a mortgage of her inheritance for 4500*l.* to supply his Lordship with money to pay for the place of Captain of the Band of Pensioners, and subject to the mortgage which was for a term of years, the estate was settled to Countess Elizabeth for life, remainder to the plaintiff her son in tail, with a covenant in the deed by the late Earl to pay the money, and a proviso that, on payment thereof, the term should cease; and on the 5th of the same month, the Earl, by letter, thanked the Countess for having sealed the mortgage, and added, that the profits of the office should be religiously applied to pay off the incumbrances. The mortgage was several times assigned, and particularly in 1683, when the Countess joined in the assignment; and then the proviso was, that, on payment of the money by them, or either of them, the term was to be assigned, *as they, or either of*

(m) 2 Vern. 689. [et vide 2 Foub. Tr. Eq. 291, 5th edit.—Ed.]

(m m) [1 P. Wms. 264.—Ed.]

(n) Per Lord Hardwicke, 1 Ves. 252. [et vide ante, 726, 7, in notis.—Ed.]

(o) *Huntingdon v. Huntingdon*, 2 Vern. 437. 1 Eq. Ca. Abr. 62. Ca. 4. 4 Vid. Abr. 69, pl. 9. 10 IB. 345, pl. 17. 1 Bro. Parl. Ca. 1.

them, should direct or appoint. When money came in, the Earl paid off the mortgage, and took an assignment thereof in trust for himself; afterwards the Countess died, and he married a second wife, one of the defendants, and he died, having, by his will, devised his personal estate, together with the benefit of this mortgage, to a trustee in trust, for younger children, which he had by his second wife. On a bill exhibited by his son by the first wife, claiming, as her heir, to have the mortgage assigned to him, the Lord Keeper Wright refused to make such decree, unless, upon the usual terms of redemption, on payment of principal, interest, and costs, discounting profits. But this was reversed upon appeal to the Lords in Parliament, *and an assignment decreed peremptorily to the plaintiff* (z).

Where a *feme covert*, being a jointress (p), created a term for years out of her estate for life, it was held, the reversion, vesting in her, would attract the redemption. Thus, where the defendant, having a jointure of 100*l.* *per annum* out of some houses in London, which were burnt down, joined with her husband in borrowing 1500*l.* to build upon the ground; and, to secure the same, levied a fine *sur concessit* for ninety-nine years, if she lived so long, and a deed was afterwards made between the conusee and the husband, wherein the husband covenanted to re-pay the mortgage money with interest, and the equity of redemption was limited to the husband and his heirs, but the wife was no party thereto; the husband, having expended 3 or 4000*l.* in building upon this ground, died; and the question was, whether the jointress, or the heir of the husband, should redeem? And it was decreed in favor of the former, for that the wife was no party to the deed of re-demise, by which the redemption was limited to the husband, and the wife being a jointress, and having granted a term for years only out of her estate for life, there vested a reversion in her, which naturally attracted the redemption.

Jointress entitled to redeem, on what principle.

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(p) *Brend v. Brend*, 1 Vern. 213.

(Z) For observations on this case, see post, 732, *in notis*.

If an agreement be requisite (A)?

Account of by-gone profits not decreed, when.

But, in the last case, as reported by the name of *Brond v. Brond*, 2 Ch. Ca. 98, it is stated, that there was an agreement, that she should not be prejudiced, but should redeem, paying the interest of the money borrowed (*q*); and that the court resolved, that the wife, having suffered the representatives of the husband to remain in possession and pay off his debts, without exhibiting her claim for a long period of time, should not be allowed any profits received by the husband's representatives, but from the time of the bill exhibited, which was the first notice to them of such agreement.

Wife's mortgage by fine, only a partial alienation of her jointure.

If a wife joins her husband, in a fine of her jointure, in order to a mortgage or security, although there be no agreement that she shall redeem, yet she is not considered in Chancery as absolutely parting with her interest (*f*); but there results a trust for her, to have her estate again when the incumbrance is paid off, as if it had been a mortgage on condition, and the money paid at the day (*B*).

(*q*) *Brond v. Brond*, 2 Ch. Ca. 98. the transposition of this paragraph,
(*f*) 2 Ch. Ca. 99, 100. 162. [For see note (U), ante, 728 a.—Ed.]

The earliest case on this head of law.

(A) An agreement either express or implied, is absolutely necessary to change the wife's equity, and make the fine operate as an absolute bar to the widow's equity of redemption. See the next note, and 1 Bligh Rep. 118.

(B) The earliest case to be found in the books on this head is that of *Rowell v. Whalley*, 1 Ch. Rep. 218, 2d edit. The facts and decree appear on the report, but the grounds of the judgment are left to conjecture, which however cannot well be mistaken. The case was briefly this:—One S. and Hannah his wife, in consideration of 300*l.* by deed bargained and sold a messuage and lands in Kent (which on their marriage was settled by the said S. on his wife for her jointure) to W. his heirs and assigns for ever; in which deed the said S. covenanted that he and his wife would make better assurance by fine; and the same deed contained a proviso, that if the said S. and Hannah his wife, or either of them, or their heirs, executors, &c. should pay to the said W. his executors, 348*l.* at the time therein mentioned, then that the said fine should enure to the said S. and Hannah, and the longest liver of them, and after to the right heirs of the said S. for ever: a fine was levied pursuant to this covenant, but the money was not paid at the day. The husband died, leaving his wife and an infant son and heir surviving, whereupon the wife filed a bill against the son and W. to redeem and to secure her jointure. W. by his answer stated, that he was willing to assign and convey the premises as the court should direct, without whose direction he could not safely do any act. The other defendant, the son and heir of the mortgagor, being an infant, the

If a woman, entitled to a mortgage, marry, and *thereupon* the husband, in consideration of her fortune, make a settle- *Husband making settlement on wife en-*

court upon hearing his answer by guardian (who acknowledged the settlement on the wife), was satisfied that the estate of W. in the premises was but a mortgage, and that the plaintiff Hannah ought in equity to enjoy the premises during her life, *notwithstanding the fine by her passed as aforesaid*; and decreed, that the plaintiff and the infant should proportionably pay what was due upon the mortgage at the time of the death of the mortgagor, rating the estate for life of the plaintiff in the premises at one-third, and the reversion in fee of the infant at two-thirds.—This case, it will be perceived, involved the question whether the widow was entitled to redeem—in respect of the estate reserved to her by the mortgage deed and fine, or in respect of a resulting trust under her prior title by settlement. The court shewed, by its decree, that her title to redeem was as tenant for life under the mortgage deed and fine, and that the heir of the husband would be entitled to the estate after her death by virtue of the same instruments. It does not appear by the report, whether there was a proviso for redemption detached from the declaration of the uses of the fine; but from the observations of the court it is conceived there was not. Lord Redesdale however has said, that the declaration which follows the covenant to levy the fine, shews that there was a distinct agreement between the parties, defining the course in which the property was to be carried after the satisfaction of the mortgage, and that this agreement was in no manner dependant on the proviso for redemption. The noble Lord expresses himself thus:—"The subsequent declaration and limitation having no connection with the proviso for redemption, but declaring what should become of the property after the mortgage was satisfied, operated against the construction of a resulting trust for the benefit of the wife. It was held to be a distinct settlement, and that she had parted with her estate." 1 Bligh.Rep. 119.

The next case to be found in the books is that of *Brond v. Brond*, 1 Eq. Ca. Abr. 62, pl. 6, and *ibid.* 316, pl. 8, the case from which the three last paragraphs in the text are taken. In the statement of that case by the learned author, from Vernon's Reports, several important facts which bear strongly on the point under consideration are omitted, as that case is stated in 2 Ch. Ca. 98 and 161, which renders it necessary to run over the leading facts again, as we find them reported in this latter place; according to which it appears that T. B. the husband of the plaintiff in the suit, settled certain houses in Bread Street, London, to the use of himself for life, with remainder to the plaintiff for life for her jointure. These houses were burnt down in the great fire in 1666. In order to rebuild them, the husband borrowed 600*l.* and a fine *sur concessit* was levied by the husband and wife to the lender for ninety-nine years, who re-demised the premises to the husband for ninety-eight years, rendering 3*6l.* per ann. The husband bound himself to repay the 600*l.* at a time, &c. [the form in which mortgages in that day were usually made.] The husband had agreed with the wife that she should have the redemption, paying the interest of the money borrowed. But when the houses were rebuilt, the husband settled them, among other lands, upon himself in tail male, with remainder in tail to his brother (the defendant), charged with portions of 3000*l.* for his

Instance, where wife's joining in fine, not deemed an absolute conveyance of her jointure.

titled to mortgage due to her before marriage.

ment of his own estate upon her, although there be no particular agreement for the purpose, yet he will be considered as

daughters. The husband died, making his brother his executor. The personal estate was not sufficient to pay his debts. The defendant had executed a bond, upon which he was liable as surety for his deceased brother to the amount of 1600*l.*, which he satisfied, and also paid the interest of the 600*l.* borrowed until 1681, when the plaintiff filed her bill, by which she prayed that she might redeem, paying proportionably, and hold over until she was repaid with interest. The defendant insisted that the premises, having been re-demised to his brother, were assets to pay his debts; and further, that the plaintiff's title was but a parol agreement between husband and wife; and that he had no notice of the agreement until the filing of the bill. It was decreed by Lord Nottingham, that the plaintiff should have the redemption, *paying a third part of the principal*, but should have no profits received by the defendant until the filing of the bill in 1681, when he first had notice of the agreement. (The decree therefore, which was made on the original hearing, proceeded entirely upon the foundation of the agreement.) A bill of review having been afterwards filed, suggesting, that the decree was founded upon a trust arising out of an agreement by the husband, and that the agreement was not mentioned in the decree, nor stated to have been proved. Lord North, C. S. admitted the objection to the form of the decree, and said, that he took no notice of the agreement on that account, but affirmed the decree, because when the wife joined in the fine of her jointure, in order to a mortgage or security, *it was not an absolute departing with her interest*, but there resulted a trust (as stated in the text) for her, when the mortgage was paid to have her estate again, as if it had been a mortgage on condition, and the money paid at the day.

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Resulting trust in favor of first wife.

Huntingdon v. Huntingdon has been already stated, ante, p. 730, but the circumstances are not correctly given in the report from whence the text in that page is taken. The Lord Chancellor is reported to have said (see p. 732, ante), that the heir of the wife brought his bill to exonerate the inheritance, and to have the mortgage paid off out of the husband's personal estate, which is repugnant to the facts of the case, and the previous statement in the report itself, that the husband had, in his life-time, paid off the mortgage. The question in the cause was, whether the executrix and devisee of the husband (being his second wife) was entitled to hold the term under the will for her own benefit; or whether there was a resulting trust for the heir of the first wife; and if so, whether he was bound to repay to the estate of the deceased husband the principal and interest which he had paid to discharge the mortgage, or was entitled to have an assignment of the term without such payment? And it was in the Lords ultimately decided, that there was a resulting trust for the heir of the first wife.

Fine levied diverso intuitu not to carry estate in new channel, without express declaration.

The case of *Lewis v. Nangle*, cited post, 938, and *Jackson v. Parker*, cited ante, p. 675, n. (C), involved a principle similar to the one we are now discussing. In *Corbett v. Barker*, 1 Anstr. 138, cited as to other points, ante, vol. i. 369, n. (A), the plaintiff's father being seised in right of his wife, he and the wife mortgaged the estate for a term of years, and a fine was levied

a purchaser thereof; and if he die, she living, it will go to his executors, and will not survive to her. Thus (r), where

(r) *Blois v. Hereford*, 2 Vern. 501. S. C. 1 Eq. Ca. Abr. 68, pl. 4.

according to a previous agreement and covenant; which fine was to enure to the use of the mortgagee, his heirs and assigns, subject to the proviso; and the equity of redemption was reserved to the husband and wife and their heirs. Afterwards the mortgage, having been assigned to the defendants, the husband and wife, in consideration of 160*l.* by lease and release, conveyed their equity of redemption to the defendant in fee, and covenanted that all fines, conveyances, &c. should enure to his sole use in fee. After the death of the husband and wife, the plaintiff their son filed the bill, claiming the estate by descent, as heir to his mother, subject to the mortgage; for whom it was argued, that though the mortgage deed was only for a term of years and the fine was in fee, yet was it to the uses mentioned in the deed; and there was a proviso, that on payment, &c. the term should be void; then only the term was in the mortgagee, and the fee was a resulting use in the wife from whom it proceeded; and *that* being vested by the statute, she was immediately in of her old estate as to the fee. Sir S. Romilly argued for the defendant, that the bill could only reach one half of the estate; for as the fine saved the equity of redemption to the husband and wife, and *their* heirs, one half was therefore vested in him, and passed to the defendant. But Thompson, B. interposed, saying, it had often been ruled, that a reservation of this kind, in a fine levied completely *diversæ intuitu*, should not, *without an express declaration of such intention*, carry the estate in a new channel, not even if it be to the husband and his heirs only. After this interposition by the court, the argument upon this point of the case appears to have been dropped, and the question was then argued and decided upon the fact of length of possession by the mortgagee. But Eyre, C. B. at the conclusion of his judgment remarked:—"As the plaintiff fails upon this point (i. e. possession by the mortgagee), it is unnecessary to consider the other, as to the operation of the fine upon the subsequent conveyance, although upon that point the plaintiff's counsel seem to be in the right."

In arguing a case in 1790 (see 3 Bro. C. C. 289) the present Lord Chancellor, then Solicitor-General, observed, "The evidence of B. is, that he received the money from C.; a fine was levied of the wife's estate in 1743: but this would not give the estate to the husband, without something further appeared, *either from the recital of the deed, or otherwise, to be the wife's intention*. This was the doctrine of the court in *Edwards v. Lady Vernon*," a case not to be found in the reports. This observation is introduced here as the probable foundation of the noble Lord's opinion in a subsequent case, where he says, "I perfectly recollect what fell from the lips of Lord Thurlow, &c." From the way in which the case of *Edwards v. Vernon* was introduced in the Solicitor-General's argument, it may be conjectured that it was a case decided by Lord Thurlow; and it shews (especially when combined with *Corbett v. Barker*) that it was the then prevailing opinion of the profession, that an ex-

Reference to
unreported case
of *Edwards v.*
Vernon.

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on the marriage treaty of Lord Hereford, with the defendant

Mere reservation of equity of redemption to husband on mortgage by him and wife, wherein she joins by fine, no alteration of her interest in estate.

plicit agreement was requisite to turn the estate out of its original channel.

From these cases no definite principle can be collected, though in all of them we see the rule which subsequently obtained obscurely hinted at. In the late cases the subject has received the fullest discussion, and the doctrine may now be considered as fixed on a firm and permanent basis. The cases to which allusion is made, are those of *Ruscombe v. Hare* and *Innes v. Jackson*, ubi infra, the one containing a negative, and the other an affirmative illustration of the rule. In *Ruscombe v. Hare*, 6 Dow Parl. Ca. 1, A. in the year 1749, mortgaged his estate to B. for 800*l.* at 4*l.* 10*s.* per cent. interest, and covenanted to levy a fine, the uses of which were to enure to the mortgagee in fee, subject to redemption. The fine was levied; and in the year 1762 A. charged the estate with a further sum of 450*l.* borrowed of B. at 4*l.* 5*s.* per cent. interest. A. then devised all his lands to his wife C., and died in the year 1764. C. married D., and they in the year 1766 consolidated the two mortgages, and agreed to pay interest at 5 per cent. on the whole sum, and executed a new security to B., discharged of the former proviso for redemption, but subject to redemption by D., in which event the re-conveyance was to be made to him in fee: D. and his wife declaring that all prior fines, &c. and a fine covenanted to be levied by them (which was afterwards levied) should enure to the use of the mortgagee in fee, subject to the condition of redemption. The wife died, leaving her husband D. surviving, and a son and heir by her former husband A. The second husband D. sold part of the premises to a purchaser, and the heir at law of the wife filed a bill against the mortgagee for redemption. The question was, whether the reservation of the equity of redemption to the husband D. by the deed of 1766 entitled him to the estate; on the solution of which question it is evident the title of the purchaser depended. In the court below it was determined against the purchaser. From this decree he appealed to the Lords. The case having been argued in *Domo Procerum*, Lord Eldon, Chancellor, observed, "The leading question here is, whether the husband had a title to convey; 2d, whether, if he had no title, the persons claiming under him can, as against the heir at law of the wife, stand in a situation better than that in which the husband would have stood. The deed of 1766 recites the mortgage for the 800*l.* and then the second mortgage for 450*l.* with interest at 4*l.* 5*s.* per cent.; and then it states that all interest was paid up by D., but that the principal sums were due; and then the motives for executing this deed of 1766 were explained; and these were for the better securing the principal sums and such interest as hereinafter mentioned, and that was the increased interest of 5 per cent. Now if it clearly appears to have been the intention of the wife, that D. should have the equity of redemption, he must have it. But still the question is, what do courts of equity consider to be evidence of that intention?"

Lord Thurlow's opinion, that though equity of redemption be reserved to

"I perfectly recollect," continued Lord Eldon, "what fell from the lips of Lord Thurlow, though it is a quarter of a century ago, upon that point [namely] that where the equity of redemption is, in these cases, reserved to the husband, if there is no other evidence of the intention, and if the recital shews that

his lady, they being both infants, an act of parliament was

the instrument is framed for other purposes, the husband is seised of the estate which he before had, with this difference, that if he before had the legal estate *jure uxoris*, he afterwards has the equity of redemption; but still *jure uxoris*: or if the estate which he before had *jure uxoris* was equitable, so it remains equitable; but still *jure uxoris*: and that equity throws this protection round the wife, that the deed should operate no further than its particular purpose, unless there is some *recital of intention* that the husband should take the benefit." [An express recital is not now necessary, though something tantamount to it is, vide *infra*, per Lord Eldon, in *Innes v. Jackson*, Dom. Proc. The noble Lord continued] "The instrument recites, that the interest was paid up to 1766, but that the principal sums were due; and that the purpose was for better securing the payment of the principal sums, and a higher rate of interest; and for what? For any other purpose? No other purpose. And then it is asked, what was the object of the mortgage? The answer is, that it was for the better securing the payment of the principal, and varying the rate of interest. You may say, that it was for the further purpose of reserving the equity of redemption to the husband. But the question comes back again to this; whether there are any special circumstances to shew that the intention was to go beyond the purpose recited in the deed? Then we have to consider what was the effect of the fine, and with respect to that, the same answer may be given. The fine was levied for the same purpose only for which the mortgage was made. If a fine by the husband alone could answer the recited purpose, the circumstance of his wife's joining with him to levy the fine might be evidence of her intention to waive her right. But that is not the case; for the estate being that of the wife, whether the purpose was to vary the rate of interest, or to entitle her husband to the equity of redemption, a fine was necessary; and in neither case could the purpose be effected without her concurrence in an assurance on record. The deed recites, that the purpose is to consolidate the funds and give a higher rate of interest: and there is nothing to shew that the wife meant to give her husband the benefit of her estate beyond this, whether that is sufficient to give the equity of redemption to the husband is the question to be determined."

Husband alone, he will have it jure uxoris only, unless intention to give it him alone be recited.

On a future day the Lord Chancellor stated the concurrence of Lord Redesdale in opinion, that the decree ought to be affirmed. And on June 5, 1818, Lord Eldon declared that the decree in the court below was right, in so far as it decided that the heir at law of the wife, whose estate had been mortgaged, was entitled to redeem, although the equity of redemption had been reserved to the husband and his heirs; for that there was no *recital*, no *special circumstance*, from which it could be concluded that the real intention was to make a new settlement of the estate—nothing to take it out of the rule that where the husband is seised of the legal estate *jure uxoris*, and husband and wife join in a mortgage of the estate—reserving the equity of redemption to the husband and his heirs, the husband has the equity of redemption as he before had the legal estate, viz. *jure uxoris*; nor any such special circumstances as those in the case of *Innes v. Jackson*, *ubi infra*.—On this declaration the de-

Grounds of decree that wife barred by fine pro tanto only.

procured for settling a jointure in bar of dower, wherein

cree was affirmed with some trifling corrections of the record ; for which see 6 Dow's Parl. Ca. 21.

Innes v. Jackson. Statement of leading facts.

The next and last case which has involved the question we are now considering, is that of *Innes v. Jackson*, 16 Ves. 356, and 1 Bligh Parl. Rep. 104. The material facts requisite to a developement of that case, are the following : By a settlement, executed in 1743, certain lands were settled to the use of R. J. (the husband) for life ; with remainder to Anne (his intended wife) for life, with remainder to the children, male and female, of the marriage, in strict settlement ; with ultimate remainder to the use of the said Anne, her heirs and assigns, for ever ; and the deed contained a proviso, enabling R. J. and Anne, his intended wife, by any deed, &c. to revoke the uses and to limit or appoint any other uses to any persons, and for any estates. In the year 1745, the husband and wife borrowed the sum of 200*l.* ; to secure the re-payment of which, by indenture, dated 25th November, 1745, they demised the said lands to J. Child (as mortgagee), for a term of 1000*l.* years, with a proviso for redemption by R. J. and Anne his wife, or either of them, their or either of their heirs, executors, administrators, or assigns, and in case of such redemption, that the term and estate thereby granted should determine. This latter instrument it is to be observed, could only have effect under the power of revocation contained in the settlement, and it operated merely to create a mortgage term, subject to redemption. R. J. and his wife, having afterwards borrowed of the mortgagee the further sum of 400*l.*, by deed, dated 1st January, 1746, confirmed to him the lands demised for the remainder of the term, discharged from all former provisos, but subject to a proviso for redemption, upon payment by R. J. and his wife, of the sum of 600*l.* with interest, whereupon the term was to be void. By the same deed, R. J. and his wife, covenanted to levy a fine (which was afterwards levied), and it was declared, that such fine should enure to the use of the mortgagee, his heirs, executors, administrators, and assigns, for the remainder of the term, subject to the proviso for redemption thereinbefore contained ; and " after the expiration, or other sooner determination of the said term, to the use of R. J. and Anne his wife, for their lives and the life of the survivor, and after the decease of the survivor, to the use of the heirs of their two bodies, and for default of such issue, to the use of the right heirs of the survivor of R. J. and Anne his wife, for ever." The mortgage was discharged by R. J., who took an assignment of the term to himself. The question was, whether the persons claiming under the wife were entitled to redeem the mortgage, which had been discharged by the husband, and to hold the estate in opposition to the limitations contained in the latter mortgage deeds, or whether the persons deriving title under the husband (who upon the death of his wife and the events which had happened, had acquired the inheritance of the estate under the fine and limitations contained in those instruments), were entitled to the estate ? The determination of these claims it is obvious, depended, on the general inquiries, whether, under all the circumstances of the case, a trust of the inheritance in the whole resulted to the wife after payment of the mortgage debt, or whether such trust was repelled by the

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it was provided, that if she, when of age, did not settle her

manner in which the estate was limited in the latter mortgage deeds, after satisfaction of the mortgage.

In the court below, Lord Eldon took the rule to be, that, if the intention is to make a mortgage of the wife's estate, that intention shall govern the parties; and the equity of redemption shall belong to the person, who had the estate before: so as to give back the inheritance to those from whom it came: exactly as when a man makes a mortgage of his own estate; and the proviso for redemption is to him, and the heirs of his body; falling short of the description of persons, who would have taken the inheritance originally, before the mortgage was made. And his Lordship said, that although the deed of 1746 had reserved the equity of redemption to the heirs of the survivor of R. J. and Anne his wife, such reservation would not alter the beneficial interest of the husband or wife. If the husband had the beneficial interest by surviving the wife, or she had the beneficial interest by surviving him, that interest would not have been varied by reserving the equity of redemption to them and their heirs: but, supposing the mortgage to have been paid off, they would have taken the beneficial interest in the same way, as if the mortgage had not been made; and their children's title would have been restored and maintained in equity. To illustrate the distinction (Lord Eldon continued) which had been very ably argued at the bar; take the case of a mortgage of the wife's estate; and the contract may assume various forms upon the face of the instrument: yet, if it operate no more [than as a security for money], a court of Equity will fix the beneficial interest on the person, who would have had it, if the mortgage had not been made. The mortgagee might, under the proviso for redemption, be authorized in making the re-conveyance to the husband and his heirs and yet that would not exclude the persons, interested in the inheritance. Where the wife's estate is mortgaged, it is of necessity that there should be a covenant to levy a fine; and, whether it is levied, or not, the agreement is, generally, evidence of an intention to do something with the estate. If the object [in *Innes v. Jackson*] was to be collected from the covenant, it was to enure to the husband and wife and their heirs: but his Lordship would not say, that the limitation might not be so expressed as to amount to more, namely, to evidence of an intention to effect a change of the beneficial interest: and the question at last amounted to this; whether, taking the whole transaction together, as connected with the instrument of 1746, any thing more was meant, than that it should be a mortgage transaction. It appeared to Lord Eldon, to be no more than a blundering mode of executing a mortgage. The only object of the covenant to levy a fine, appeared to be to secure the mortgage money; and his Lordship asked, could a fine, to be levied at the request of the mortgagee, for his security, have the effect of a revocation of the uses of a settlement, and a declaration of new uses; altering the interests of the wife and family in her estate? Was it apparent on the face of the deed of 1746, that the parties intended to do something more than merely to make a mortgage? The noble and learned Lord thought not; and thereupon decreed in favor of the persons claiming under the wife. See 16 Ves. 371.

Lord Eldon's expression and illustration of rule.

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His opinion and decree that on face of mortgage, nothing more was intended than the mortgagee's security.

From

lands, part of the jointure should cease, and nothing was said as to the personal estate; but, upon the treaty, inquiry

That decree reversed in Dom. Proc. Grounds of reversal.

From this decree the persons deriving title under the husband appealed to the House of Lords, 1 Bligh Parl. Rep. 104; on which occasion, Lord Redesdale went fully into the merits of the case, cited the principal authorities, and in the course of his judgment remarked,—that the proviso for redemption contained in the first deed of mortgage, stipulating, that “if R. J. and Anne his wife, or either them, their, or either of their heirs, &c. should pay, &c.” was by the second deed of mortgage discharged; and in this latter instrument the proviso was simply, “if R. J. and Anne his wife should pay, that then the said indenture, and the former indenture of mortgage, should be void.” The effect, therefore, of the second deed was to confirm a term of years, which should be redeemable and cease on re-payment of the money borrowed, and after such determination of the term, the lands were settled to specified uses. The principle was this:—That in a mortgage the mere form of reservation of the equity of redemption is not of itself sufficient to alter the previous title. In such a case, (where fraud is out of the question), it is supposed to arise from inaccuracy or mistake, which is to be explained and corrected by the state of the title as it was before the mortgage.

General principle.

Lord Redesdale's expression of rule after review of cases.

That rule applicable to cases of dower and jointure.

His Lordship then cited the principal cases, and observed: “It must now be admitted, as an established principle, to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife, or the estate of the husband, if the wife joins in the conveyance, either because the estate belongs to her, or because she has a *charge by way of jointure or dower*, out of the estate, and there is a mere reservation in the proviso for redemption of the mortgage, which would carry the estate from the person who was owner at the time of executing the mortgage, or, where the words admit of any ambiguity, that there is a resulting trust for the benefit of the husband, according to the circumstances of the case.”

Rule applied to case in question.

But it seemed to Lord Redesdale, in the case before the House, that the operation of the deed of 1746, as to the mortgage term, and the operation of the deed as to the limitation of the fee, were wholly distinct, and in no way dependant on each other. The question did not arise on the interpretation of the proviso for redemption, but it arose upon a distinct and subsequent clause of the deed [respecting the reversion]. The term and the fee were kept distinct in the deed. The term was a security for the re-payment of the money lent, and when the mortgage should be discharged, the intention of the maker of the deed was, that the term should be completely at an end. The way in which the parties proposed to effect this was, by declaring, that upon payment of the money due, the term should cease. If the money had been paid at the day, the term ceasing, there would have remained nothing of the mortgage operating on the property. But there would then have remained the declaration in the deed, directing what should be done with the estate, subject to the term. The term being at an end, the operation of the deed, so far as it declared the limitations of the estate subject to the term, remained perfectly distinct, and had no connection whatever with the existence of a term which then would have ceased to exist. A court of equity would so deal

was made what was her portion or fortune, and a particular given in of what her personal estate amounted to, wherein

with the declaration, that although the term became absolute by non-payment of the money at the day, yet it would hold it still subject to redemption. By whom it might be redeemed was to be discovered from the title; which by the deed itself, was declared to be in the husband and wife, for their respective lives, then to the heirs of their bodies, and then to the survivor in fee. In all the other cases decided upon the general principle, the grounds of decision were, "that the mode in which the redemption was limited, was by mistake or improper contrivance introduced into the deed." But in the case before the House there was no ground to raise such imputations. For the deed was clear and express in its declarations and provisions.

Lord Redesdale continued, "Where the declaration of the uses of the fine refers simply to the operation of the deed as a mortgage, where it is simply a declaration, that the money being paid, the fine shall enure to the persons who make the mortgage, and there is nothing else which makes it subject to redemption, that would be considered as a mere clause of redemption, and construed in the same way. But where the form of the equity of redemption has nothing to do with the limitation of the estate, where the limitation of the estate is perfectly distinct, the rules which have been established in the cases of resulting trusts do not in any degree apply, according to the mode in which the settlement of 1746 has been made, there is no connection whatever, in legal operation, between the mortgage and the new limitations contained in the deed, which are distinct in form and substance, expressly providing for a subject which was not included in the mortgage. They limit the reversion in fee, while the mortgage is confined to the term of 1000 years." On these grounds Lord Redesdale conceived that there was no foundation for holding that the mortgage-deed and settlement of 1746 should not have the operation which the words of the deed imported, and he was therefore of opinion that the decree, which had been pronounced, was erroneous. He should move simply to reverse the decree, and that the bill should be dismissed.

Lord Eldon then observed, that the circumstances of the case were, certainly, much better understood than they were, and much greater research had been made into cases, so as to bring before the consideration of the House the true principle of decision. The court below did not rightly apprehend the case, as it then appeared. The judgment of the House would remove a difficulty which his Lordship knew was floating in the minds of many persons. He conceived it to have been the opinion of Lord Thurlow, that in order to dispose of the equity of redemption of the wife in an estate, it was absolutely necessary that there should be in the recitals of the instrument some expression that the parties meant it so: that it was not enough to collect the intention from the limitations; but that there must be something more upon the face of the deed to lead the wife to understand what those limitations were. It appeared, however, on looking into the cases which had been referred to, that such a proposition could not then be supported; and therefore Lord

Limitation of estate to new uses, annexed to proviso for redemption, no effect: contra, if such limitation be distinct from form of proviso.

Motion for reversing decree.

Lord Eldon's concurrence in motion.

Recital that change of rights intended, unnecessary.

(*inter alia*) mention was made of a mortgage for 1800*l.* taken in Lady Bacon's name. Lady Bacon dying, made her three daughters executrices, and their husbands gave a declaration of trust that half belonged to Lady Hare, and half to Lord Viscount Hereford. A settlement was made by the defendant, after she came of age, pursuant to the marriage agreement, and then Lord Hereford died, having made the plaintiffs his executors. The question was, whether this money should go to the plaintiffs, or should survive to the wife as a *chose* in action? The Lord Keeper, in determining, observed, that he laid no stress upon the declaration of trust; putting that out of the case, the law of the court would presume a promise; and, in all cases where there was a settlement equivalent, it would be intended the husband was to have the portion; the wife should not be permitted to have her fortune and jointure both, and the rather, in this case, because it was a trust, and the husband could not come at it so as to alter the property,

P. 739

continued.

Practical result
of cases.

Eldon was of opinion that the decree ought to be reversed, which was reversed accordingly.

From the whole of the numerous yet consistent cases on this subject, we may collect the following practical result:—1st. That if the mortgage-deed contains no limitations of the estate beyond the security, and reserves the equity of redemption to the husband alone, in that case the wife's original interest will be preserved to her, on the principle, that she being the sole owner of the estate, the *mere form* of the reservation of the equity of redemption will be insufficient of itself to alter her prior title to the property, and the circumstance of the reservation having been made otherwise than to the owner of the estate (the wife in the present instance), will be presumed, by law, to have originated either in the *inaccuracy* of the clause, or in the *mistake* of the person who prepared or engrossed the deed; circumstances which could not, in justice, be allowed to prejudice the rights of the person having the prior title. But, 2dly, that if the mortgage-deed contains a settlement of the wife's estate, and the mortgage or the form of reservation of the equity of redemption has nothing to do with the subsequent limitations of the property, but is perfectly distinct from them, as where the mortgage is for a term of years, and the limitations apply to the inheritance, in that case these limitations, through the medium of the wife's fine, will take effect; and the persons entitled to redeem will be, not the wife under her prior title, but the persons interested in the estate under the uses or limitations contained in the mortgage deed.

See a form for the mortgage of a wife's estate of inheritance in the Third Volume, and for the application of the same principle to dower and jointure, ante, p. 677, n. (D).

without the assistance of a Court of Equity; and the defendant was condemned in costs (c).

(C) This is a mistake, no costs were given on either side, as appears by Mr. Raithby's n. (1), 2 Vern. 502, referring to Reg. Lib. 1704, A. fol. 444. *Case in text no authority.* This case is said to be strangely reported by Lord Com. Aston, in Amb. 692; and the principle of it is certainly at variance with the modern decisions on the subject. Mr. Cox, in his n. (D) to *Lord Carteret v. Paschal*, 3 P. Wms. 199, says, "it is to be observed, that in all cases where a husband makes a settlement of his own estate on his wife in consideration of her fortune, the wife's portion, though consisting of choses in action, and *though there be no particular agreement for that purpose*, is looked on as a purchase by him, and will go to his executors;" and cites *Cleland v. Cleland*, Pre. Ch. 63; the principal case, ubi supra; and *Packer v. Windham*, Pre. Ch. 412. The case in the text evidently supports Mr. Cox's observation; but the very reverse of that statement of the law is the doctrine promulgated by the recent determinations. Instead of no particular agreement being necessary to convert the husband's anti-nuptial settlement into a consideration for the purchase of his wife's fortune, the modern cases have fully established that an actual agreement for that purpose, either express or implied, is absolutely requisite to confer on the husband the entire dominion of his wife's personal estate, mortgages, and choses in action.

That the husband's title to his wife's choses in action by settlement, depends on his express or implied contract to purchase them, the following cases will clearly evince. In *Heaton v. Hassell*, 4 Vin. Abr. 40, pl. 11, n. it appeared that the wife had lands of the value of 700*l.*, and also 500*l.*, due to her on bond, which at the time of her marriage remained in her brother's hands. Her husband, before their marriage, made a settlement, and in consideration of a considerable fortune and portion with his then intended wife, he granted, &c.; but of what particulars her fortune or portion consisted did not appear by the settlement. The question was, whether the bond for 500*l.*, being a chose in action, and not called in by the husband during his life, was assets in equity to satisfy a debt of the husband's, the wife having enjoyed the benefit of the settlement made upon her out of the husband's estate, and which would have been liable to the demand? It was insisted for the creditor, that if the bond debt had been particularly mentioned as part of the consideration for the settlement, there would have been no doubt of its being assets of the husband; for, in equity, the husband would have been the purchaser of it by making the settlement: and that there was no difference where the consideration was of the wife's portion generally, especially in this case where she had nothing but lands beside the bond for 500*l.*; so that the bond must be taken as the consideration of the settlement (there being no other), and the rather in favor of a fair creditor, who otherwise must lose his debt, and, if no settlement had been made, might have had a satisfaction out of the lands. But *per Parker*, Chancellor, the case is so very clear that the widow's counsel need not argue it. In this case creditors cannot be in a better condition than the executor of the debtor: and can it be imagined that if another person had been made executor to the husband, and such a person had filed a bill against

Agreement requisite to make husband purchaser of his wife's choses in action.

But settlement in this case must be made before marriage.

But Lord Hardwicke observed, upon this head of equity, in his judgment in the case of *Lanoy v. Duke of Athol* (s),

(s) 2 Atk. 444. [S. C. 9 Mod. 398.—Ed.]

Such agreement must appear on settlement.

the wife to compel her to assign this bond, that the court would have decreed for the executor? What the law gives the husband by the intermarriage is a good consideration for making a settlement; but the husband's making a settlement does not vest in him the choses in action of his wife, *unless it be expressly so agreed between the parties*, and that appears to be part of the consideration of the settlement, for then the husband is a purchaser, and well entitled to them in a court of equity. His Lordship therefore decreed that the sum of 500*l.*, secured by the bond, was not liable to the demand of the husband's creditor.

Same law recognized by Lord Hardwicke.

On the same principle *Garforth v. Bradley*, 2 Ves. 676, was decided. In that case Lord Hardwicke said, the question before him would depend entirely on the construction of the marriage settlement and the covenants therein; for, as to the general question, the chose in action would certainly survive to the wife, if nothing by way of *contract* altered the case; for wherever a chose in action came to the wife, whether vesting before or after the marriage, if the husband died in the life-time of the wife, it would survive to the wife. With this distinction, that, as to those which came during the coverture, the husband might for them bring the action in his own name, and might disagree to the interest of the wife, and that recovery in his own name was equal to reducing it into possession.—The whole case, which is long and intricate, proceeds on the rule, that a contract or agreement is necessary to entitle the husband absolutely to his wife's chose in action. As to a suit at law, in the name of the husband alone, see 1 Selw. N. P. 287.

Mere settlement insufficient to raise gift to husband of wife's fortune.

This principle was again fully acknowledged by the Lords Commissioners Bathurst and Aston, in *Sawley v. Sawley*, Amb. 692. The case was to this effect—The wife was entitled to a rent-charge of 300*l.* under her marriage settlement, and she having survived her first husband took another; but previously to the second marriage a settlement was made, by which, in consideration of such intended marriage, and for providing and settling a competent jointure and maintenance for her, and for making a proper provision for the children of the marriage, certain estates were conveyed to trustees for those purposes. A further settlement was made by the husband of 4000*l.* The husband died before the wife, at which time an arrear of 1098*l.* being due in respect of the rent-charge, a question arose, whether the wife was or was not entitled to it? It was determined in her favor; as having survived her husband, upon the principle that a mere settlement upon marriage is insufficient to raise a gift to the husband of his wife's personal estate; but that in order to entitle him to it *there must be an agreement*, either express or implied.

Settlement must contain or import an agreement.

It is also observable, that Lord Eldon, in a late case (*Druce v. Dennison*, 6 Ves. 395) said, that according to modern cases, it was established that the settlement to be the purchase of the wife's fortune must either *express* it to be for that consideration, or the contents of the settlement altogether must *import that*; and *plainly import it as much as if it were expressed*. That such

that all the cases to which this principle had been applied, were upon settlements made before marriage, and that he could not find a case so determined, where it was a voluntary settlement after marriage. And his Lordship, in that case, in which a second settlement had been made after marriage on an accession of fortune to the wife, held, that the husband was not *thereby* a purchaser of that accession of fortune; and the ground he went upon was, that there was *no* contract on the *part* of the wife; for *she was incapable* of contracting herself, neither had she *a father or guardian* to contract for her (f) (D).

(f) Et vide *Tomkins v. Ladbroke*, Wms. 11. *Rudyard v. Neirin*, Pre. 2 Ves. 595. [*Adams v. Pierce*, 3 P. Ch. 209. 2 Freem. 262. and *Marsh v.*

was the result of the cases upon the subject, and that it was not worth while to consider in what respect the older cases were unsatisfactory; involving inquiries not very easy to execute. And his Lordship was of opinion that a settlement by the husband, on his marriage with his wife, in the event of her surviving him, of considerable sums in government securities for her own use, with a covenant to secure to her an annuity for her life, would not entitle the husband to her choses in action to which she was then entitled, as the settlement in the case before him expressed or imported no agreement that by making such provision he should have them, consequently they survived to her, if she outlived her husband. But the husband having by his will made bequests in her favor, and treated her choses in action as his own, and bequeathed them as such, as appeared from his books and certain papers which were given and admitted in evidence, the question terminated in that of *election*, so as to put the widow to elect whether she would give up her choses in action, and take under the will, or whether she would surrender her benefits under that instrument, and retain her own property. As to this latter point the reader is referred to *Dillon v. Parker*, 1 Swanst. Rep. 359, and the reporter's notes to that case throughout.

(D) Sir T. Clark held to the contrary in *Sykes v. Meynal*, 1 Dick. 368. In that case Ann Holden was married to three husbands; the first was entitled to the mortgage in question: he died, and appointed the defendant Ann his executrix and residuary legatee. She afterwards married S. B.: he made a settlement on her after their marriage and died; but the mortgage was not reduced into possession. She afterwards married T. H.; and he died. S. B. died intestate. The plaintiff, his sole next of kin, brought his bill to have the benefit of the said mortgage, insisting, that though it was not reduced into possession, S. B. became a purchaser of it by the settlement. Sir T. Clark, M. R.—“The single question in this cause is, whether a mortgage to the first of the three husbands of the defendant Ann Holden, of whom she was executrix and residuary legatee, is a chose in action not reduced into possession, or by any act done on the marriage of the defendant Ann with

But though husband do not by settlement purchase his wife's choses in action, yet if he bequeath property to her, she will be put to her election.

Case where settlement after marriage, held to entitle husband to his wife's mortgage.

Quantum of benefit to wife immaterial.

It seems, that, in such cases, the *quantum* of benefit the wife receives by virtue of the settlement is immaterial; such

Head, 3 Atk. 720.—Ed.] If the ac- ment disproportionate, a court of quisation be great, and the settle- equity will, nevertheless, require her

the said S. B., or since by settlement, it belonged to the said S. B. ? In this case it depends on a settlement *after* the marriage. The property Ann was entitled to is part of the consideration of the settlement ; though it might not have been good against creditors, it is good against the wife. In *Jones v. Marsh*, decided by Lord Talbot (for which see ante, 660), a very considerable sum came to the wife after the marriage by a collateral relation, in consideration of which the husband made a settlement of all his estate : it was held good, though against creditors." His Honor then mentioned the case of *Lanoy v. Athol*, before stated, and concluded by observing, that he was of opinion that S. B. was a purchaser of his wife's interest in the mortgage : therefore, he added, " S. B. by virtue of the settlement made by him, became entitled to the mortgage in question : and let an account be taken of what is due on it, and declare the plaintiff is entitled to one moiety, as sole next of kin of S. B., who died intestate ; and that the defendant Ann holden, his widow, is entitled to the other moiety."

That case considered and deemed untenable.

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This case is in direct opposition to the doctrine of Lord Hardwicke, in *Lanoy v. Athol* ; but since it does not proceed on the principle of the previous decisions, much hesitation will necessarily arise before it can be admitted as a sufficient authority to over-rule the firstly mentioned case. The two cases cited by his Honor, as warranting his decree, have, it is conceived, a contrary tendency ; and it is worthy of particular regard to observe this difference between a settlement before and a settlement after marriage. The former is made at a period when the parties are able to contract with each other ; the latter at a time when the law has denied them that power. And the principle, says Mr. Roper (1 Bar. & Feme, 303), " is a general one, and not applicable to any particular case. It is this, that considering the relation between man and wife, and the opportunities which he has of practising upon her affection and fears, so as to take undue advantage, the law throws around her a shield of protection, and disables her from contracting personally with him relative to her property, except according to the forms which it has prescribed." If therefore the preceding cases prove that an *actual agreement or contract* is necessary to give to the husband his wife's choses in action, in consideration of the provision made by him for her, it appears to be a necessary consequence, that a settlement made *after* marriage by the husband upon his wife, even upon an accession of fortune to her (not given to her separate use and disposition), where the transaction is *between themselves only*, without the assistance of the wife's father or guardian, or the aid of the court, will not constitute the husband a purchaser, but the wife's title by survivorship will prevail notwithstanding this post-nuptial contract. On these grounds it is submitted that the case of *Sykes v. Meynal* cannot be maintained ; for that a settlement after marriage will not bind the wife, or entitle her husband to her choses in action, except such settlement be confirmed by her after her husband's death (as mentioned in p. 721, 2, ante), or unless it be confirmed under a decree

cases proceeding upon the ground of equality; there being a settlement made by the husband on his wife, whereby he be-

property to be settled (E), and see *Burden v. Dean*, 2 Ves. jun. 607. [This latter case proves nothing directly to the point, but merely an inference that from the circumstances of the

case, it appeared that the wife's fortune was in contemplation of the parties when the settlement was made. —Ed.]

in equity during the husband's life, or another settlement be directed by the court, and approved by the master, or except the contract were between the husband and the wife's father or guardian, or trustee acting for her, and the transaction were *bona fide* and equitable.

(E) In a case where considerable accessions of personal property accrued to the wife after the marriage it was held, that she was entitled to a further provision in favor of herself and children, on the ground, that the settlement on her marriage was inadequate to the fortune she afterwards acquired; and it was referred to the Master, to see that a proper sum was settled on her and her children; regard being had to the extent of her fortune and the settlement already made. *Lady Elibank v. Montolieu*, 5 Ves. 737. In another case on this subject it appeared from the settlement, that the wife had given up to her husband a great part of her fortune, who, in consideration of such fortune, covenanted to make a provision for his wife and children: Sir W. Grant said, that the mere fact of a settlement was not evidence, that the husband became a purchaser of all the fortune that might afterwards come to the wife, that the settlement in the cause appeared to be in consideration of her fortune as specified and described in the deed itself, part of which was settled and part paid to the husband, so that he could not be considered a purchaser of any thing more than the fortune the wife then had. See *Milford v. Milford*, 9 Ves. 89. Consistently with this doctrine, his Honor decided the case of *Carr v. Taylor*, 10 Ves. 374; there the consideration of the settlement was expressed to be the portion or fortune which the husband would have or receive on the marriage. The wife afterwards became entitled to a share in the residuary estate of an intestate, part of which consisted of a bond debt due from the husband and his father. The husband having become a bankrupt, the question was, whether the wife was entitled to an additional settlement out of property accrued to her after the date of her marriage settlement; which could not be, if by such settlement, the husband had purchased for his own benefit, all subsequent property to which his wife might become entitled during the marriage. The Master of the Rolls decided, that as the settlement might be construed to mean either the fortune which the husband would actually receive at the moment of the marriage, or the rights he would acquire by the marriage; and as the latter intention was neither expressed nor clearly imported in such settlement, its operation should be confined to the wife's property at her marriage; so that her husband was not a purchaser of her after-acquired personalty, and consequently, that she was entitled against his assignees to an additional settlement out of it. But it has been lately held, that a divorce obtained by a wife after her husband's bankruptcy, does not entitle her in equity to the whole of a fund bequeathed

Wife entitled to additional settlement, when future accessions are great.

As to additional settlement in bankruptcy.

comes a purchaser of her fortune ; and therefore, on the one hand, as she is to have the provision made by the settlement, so, on the other, he shall have her whole portion.

Settlement of wife's own estate enough to give husband her fortune.

And it is not necessary that there should be a settlement of any estate by the husband upon his wife (u) ; if she have a provision, in case she should survive him, out of her own estate, that will entitle him to the remainder of her fortune, although nothing moves from him ; for it is sufficient that such is the agreement of the parties ; because, if he reduces it into possession during the coverture, it will be his absolutely, and he might release it. If there be no agreement, the law, which gives her the chance of survivorship, must take place, but she waives that chance by *an express agreement* of having so much at all events ; and the husband's departure from that absolute right which the law gives him over the whole, either by reducing such debt into possession, or by releasing it, is of itself a sufficient consideration (F).

(u) *Adams v. Cole*, Ca. temp. Talb. 169, 170.

to her which came into possession after the bankruptcy, although no settlement was made upon her at her marriage, and her husband at that time received 1500*l.* stock in her right. Upon a reference to the Master to approve of a proper settlement upon the wife out of a fund accruing in her right, which was claimed by the assignees of her husband, the Court directed the Master to have regard to the extent of the fortune received by her husband in her right, as well as to any other settlement which he might have made on her. *Green v. Otte*, 1 Sim. & Stu. 250. But though the Court will compel the assignees of a bankrupt to provide for the bankrupt's wife, yet a purchaser before the bankruptcy is not compellable to make such a provision. *Elliott v. Cordell*, 5 Madd. 49. On the subject of a wife's right to a settlement of her own equitable property in case of her husband's bankruptcy, see *Bereford v. Hobson*, 1 Madd. 362, where the principal cases are examined.

Provided there be express agreement that he shall have it.

(F) In this case the husband, having no property of his own, by an obligation given by him to trustees, reciting that *his intended wife's fortune amounted to about 500*l.**, agreed to pay to her annually 10*l.* for her separate use, and that if he survived her, she should have the power to dispose, by will, of 100*l.*, her wearing apparel, watch, rings, and jewels ; but if she happened to be the survivor, then he stipulated to leave her 200*l.* and all her wearing apparel, &c. to be at her sole disposal ; and for better securing the premises he agreed, upon request, to settle lands of the yearly value of 12*l.* The wife being entitled to a debt of 200*l.*, secured by bond given to her *dum sola*, the question was, between the surviving wife and the residuary legatee of the

But as the last-mentioned *cases* rest upon *its* being the express agreement of the parties (x), the principle will not apply where the wife is an infant at the time of such settlement, or where the settlement is made after marriage; for in such cases the wife is incapable of contracting.

Except wife be infant, or settlement be voluntary.
[745]

But if a settlement, made before marriage, be expressly made in consideration of *part* of the wife's property *only*, that will destroy the presumption that it was made in contemplation of the *whole* of her fortune; and, in such case, I apprehend, what is not specifically conveyed to the husband will survive to the wife.

Settlement by husband in express consideration of part of wife's fortune, deprives him of residue.

Thus (y), where on the marriage of the plaintiff's father with the defendant, who had a portion of 300*l.* in her brother's hands, secured by his bond, a farm was settled upon the defendant for her jointure, expressly in consideration of 100*l.* paid for her marriage portion; the husband afterwards dying indebted by bonds, wherein he and his heirs were bound, and actions being brought thereupon against the plaintiff, as his heir, to subject the real estate descended to the payment thereof, he exhibited his bill to have the remaining 200*l.* of the portion, which was unpaid, applied in discharge of the debts. It was pretended by the defendant, that there was but 100*l.* of her portion to be paid, and that it was agreed by her husband and herself before marriage, that the remaining 200*l.* should be her's; and besides that her husband being dead, and this being a debt to her, not disposed of, it did by law belong to her. But, for the plaintiff, it was said to have been expressly agreed before the marriage, that the remaining 200*l.* of her portion should be applied to pay the husband's

(x) Vide 2 Atk. 448, 449.

(y) *Cleland v. Cleland*, Pre. Ch. 63. S. C. 1 Eq. Ca. Abr. 70, pl. 14.

husband, whether this bond debt, as a chose in action, and not reduced into possession by the husband, was the property of her, or of the residuary legatee? Lord Talbot determined in favor of the latter.—In this case, therefore, there may be said to be an express contract between the husband and wife, to divide the wife's fortune in manner above-mentioned, she agreeing to take part of it in certainty; rather than run the risk of losing the whole by her husband's receipt of it during the marriage, so that thereby the husband became a purchaser of the bond debt for 200*l.*

debts, if there was occasion. Neither of the agreements were well proved. The Master of the Rolls decreed the 200*l.* to be applied towards payment of the husband's debts; but, on appeal to the Lord Chancellor, his Lordship was of opinion, that as the case was, unless there was an agreement that the husband should have the 200*l.* it would survive to the wife, and therefore his Lordship directed an issue as to this point.

Husband agreeing to make settlement, takes his wife's fortune, though she died before settlement made.

And if (x), on the marriage, there be an agreement made in consideration of the wife's portion, to make a settlement upon her for a jointure, and to settle lands upon the children of the marriage, and the wife dies before the settlement can be made, yet her portion shall go to the husband or his representatives, and shall not survive to the representatives of the wife; for he, being in no default, ought not to suffer by the act of God.

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Except settlement fall short of what was agreed on.

But (a), in such case, where a wife survived her husband, who, it was alleged, had, in consideration of her fortune, which he expected to receive (and which was represented to consist of lands and money on bond, and to be of the value of 500*l.*) settled upon her a jointure of 45*l.* *per annum*; the wife alleging *the jointure fell short of what, by the marriage agreement, it ought to have been*, and no fine having been levied, nor assignment made of the bonds, the court dismissed a bill brought by the husband's creditors to subject her property to his debts; saying, that the widow had the title in law to the lands, and the securities remaining unaltered, and being *choses* in action, the benefit whereof survived to her, equity would not interfere to wrest them from her (g).

(z) *Meredyth v. Wynn*, Pre. Ch. 312. (a) *Lister v. Lister*, 2 Vern. 68. Gilb. Eq. Ca. 70. 1 Eq. Ca. Abr. 70, S. C. 2 Freem. 102. 1 Eq. Ca. Abr. pl. 15. 68, pl. 3.

Husband must perform his covenant before he can claim his wife's choses in action.

(G) It may here be in order to observe, that when the husband is a purchaser by settlement of his wife's choses in action, if the provision for his wife and children be executory, that is, if it rest upon his covenant, then neither he nor his assignees will be entitled to recover them in equity, until they have specifically performed the stipulations in the settlement; if, however, the covenant be future and contingent, as that the husband's executors should, after his death, if his wife survive him, pay to her a sum of money, then, as the act to be done in performance of the covenant is contingent, and

If a *feme covert* be a mortgagee, her husband, by virtue of the marriage, will be entitled to the mortgage as a *chose in action*, though there be no settlement; and, if it be reduced into possession in his life, it will go to his executors, and not survive to his wife. The case of *Parker v. Wyndham* (b), as to this point, was attended with circumstances peculiarly striking. It was thus: Mrs. Anne Ashe, being entitled to the sum of 5500*l.* secured to her by a mortgage for years taken in the name of trustees, and likewise to 3000*l.* secured in the same manner, taken in her own name, and to other personal property, became a lunatic; and, on a commission of lunacy issued out for that purpose, the custody of her person and estate was committed to one of the defendants. Some time after, Philip Parker, the plaintiff's brother, by some contrivance, got at the lunatic and married her, without making any settlement or provision for her; Parker and others were after-

Husband entitled to wife's mortgage as a chose in action, if he reduce it into possession in his life-time. (H).

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(b) Pre. Ch. 412. Gilb. Eq. Ca. see his Lordship's observations on this 98. 102. And this case was approved subject there. [cited ante, 741, n. (C). by Lord Hardwicke, in the case of —Ed.] *Garforth v. Bradley*, 2 Ves. 676, and

may never happen, and the husband's right to his wife's choses in action by purchase under the settlement is immediate and absolute, the court will not postpone his title to receive them until he perform such an act as he engaged to do by the covenant. *Basvi v. Serra*, 14 Ves. 313. S. C. 3 Meriv. App. 674. But when the husband's covenant to pay or settle amounts to a present and certain obligation, as to do the act immediately or at a fixed period, then the wife will have a lien upon her own property for the consideration agreed to be given by the husband for its purchase, which must be paid or settled before the court will take from her such property. *Mitford v. Mitford*, 9 Ves. 96.

(H) The preceding cases (beginning with *Blois v. Hereford*, ante, 735) prove, that where the husband makes a settlement on his wife, under an express agreement that he shall be entitled to all his wife's fortune, whether consisting of choses in action or otherwise, he will then be considered as a purchaser, and the choses in action of his wife will belong to his representative, though not reduced into possession during his life-time. We now turn to a case which decides, that the husband will be entitled to his wife's choses in action, without a settlement, *provided he reduce them into possession during his life-time*; but nothing short of an actual receipt of the principal, or an entire change of the property of the chose in action will be sufficient to reduce it into possession. There must be something to divest the wife's right, and to make that of the husband's absolute; such as a judgment recovered in an action commenced by him alone, or an award of execution upon a judgment recovered

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continued.

Of choses in action, and reduction of them into possession.

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wards committed by the court to the Fleet, and it was ordered, at the same time, that all the deeds and securities relating to the lunatic's fortune, and also her jewels, &c. should be brought and lodged with one of the Masters of the Court, in order to secure some provision for the wife in case she should survive her husband, and likewise for the children of that marriage, in case there should be any. Some time afterwards, on Mr. Parker's application to the court, by petition, to have the commission of lunacy superseded, it was so directed; but, in regard Mr. Parker's estate was much incumbered, and he had made no settlement on his wife, it was, at the same time, ordered that so much of the 5500*l.* as was necessary, should be applied towards disencumbering his estate, and the residue laid out in a purchase of lands, which, together with so much of Mr. Parker's estate as would make up 500*l.* *per annum*, was to be settled in strict settlement, and the rest of his lady's fortune was to be paid and delivered to him. Mr. Parker never complied with any part of this order, but, being indebted to one Goodinge in a considerable sum of money, Goodinge brought his action against him, recovered judgment, and took out a *fi. fa.* and thereupon the mortgage of 3000*l.* was sold by the sheriff, and the debt paid. After this, Mr. Parker, being indebted to the plaintiffs, his sisters,

by him and his wife, or a decree in equity for payment of the money to him, or to be applied for his use. Pre. Ch. 412. 418. So, a release of the chose in action by the husband alone for valuable consideration, will be a reduction of it into possession, 1 Pres. Abs. 349, and post, 749, 50; but mere receipt of interest on a mortgage, bond, legacy, or note, will not amount to that alteration of right which is requisite to dispossess the surviving wife of her title to the chattels belonging to her before marriage, or accruing to her during coverture. See *Nash v. Nash*, 2 Madd. Rep. 139. And the same, it is presumed, may be said of a verdict obtained by the husband in an ejectment against the tenant in possession of the mortgaged premises, for thereby the right to the chose in action will not be altered, but only secured or enforced, see post, 750, 1. Neither will the payment of interest on a mortgage of the wife's term made by her before marriage, nor a payment of the money secured by that mortgage, nor a bequest of the term as the husband's own property, be sufficient to prevent the wife's right by survivorship. *Pitt v. Pitt*, 1 Turn. 180. And for further on the subject of choses in action in general, see Butl. Co. Litt. 351 a. n. (1). 1 Pres. Abs. 347. 1 Rep. Bar. & Fem. 201. 1 Madd. Ch. 478, 2d edit. *Hornby v. Lee*, 2 Madd. 20. *Stamper v. Barker*, 5 Madd. 157; and *Roberts v. Spicer*, 5 Madd. 491. And that the wife should join her husband in a suit at law for her choses in action, see 1 Selw. N. P. 287, n. 5th edition.

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in about 2000*l.* each, given them for their portions, did, by indenture taking notice thereof, assign 5500*l.* mortgage, and all securities taken for the same, and also all other the fortune and portion belonging to him in right of his wife, to trustees, in trust, in the first place, to pay thereout to the plaintiffs their portions, and then, in trust for himself, his executors and administrators. Some time afterwards the 5500*l.* was paid in, and Mr. Parker not having complied with the terms of the last order, that sum was again placed out at interest on a security taken in the name of a junior Master of the Court; subsequent to which, Mr. Parker died intestate and without issue, and in about two years Mrs. Parker died likewise intestate and without issue. Whereupon the plaintiffs, who were sisters and heirs at law to Mr. Parker, and also creditors as above-mentioned, took out letters of administration to Mrs. Parker, the wife, and brought a cross bill to have the fortune and securities delivered over to them.

And the court resolved (c), that as to the marriage, it was then out of the case, and that the order of the 19th of March was likewise to be laid aside; for as the husband, if he had complied with the terms of that order, would have been a purchaser of his wife's fortune, so he, not having complied with it, it was just as if no such order had been made; that the wife being now dead, and no children left, the reason for this court's interposing was at an end, and then, as to the 5500*l.* that being paid in during the coverture, was the husband's money, and the property absolutely vested in him at law. That although the court had thought fit to lay their hands on it, and had power so to do, it having been paid into the Master's hands, yet that was only in the nature of a caution till the husband should make some provision for his wife, which being then unnecessary, equity would follow the law and give it to the husband's representatives, to whom it belonged. As to the 3000*l.*, that being sold by the sheriff on a *fi. fa.* before the husband's assignment, the sale must take place against the assignment, though perhaps the plaintiff might have an equity to the remainder, after payment of

(c) Et vide *Cleland v. Cleland*, and *Blois and Martin v. Lady Hereford*, ante, 735. 740, n. 745.

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Goodinge's debt; for the husband might assign over a term on mortgage for years, which he had in right of his wife, and so he might likewise the trust of such term, and it would prevail against the wife although she survived (*d*).

Surviving husband entitled to wife's mortgage under statute of distributions
(1).

If the wife die possessed of a mortgage, and the husband survive, it will vest in the husband, by virtue of the statute of distributions (*e*), for the *proviso* therein, saying, "that the statute shall not extend to the estates of *feme coverts* that die intestate, but that their husbands may have administration of their personal estates, as before the making of the act," was made in favor of the husband, and not to his prejudice; so that it was intended by parliament, that the husband should be within the statute of distribution, so as to take the wife's *choses* in action as to his benefit, but should not be within the same, as to his prejudice; and this is upon good reason; for

(*d*) Et vide *Bosvil v. Brander*, 1 P. Wms. 458. S. C. *infra*, 751, 2.

(*e*) Vide 1 P. Wms. 382. 29 Car. 2.

Husband surviving entitled to entirety of his wife's personal estate.

(1) The true mode of expressing this rule is adopted by an eminent cotemporary writer, thus, "If the husband survive the wife, then these choses in action will belong to *her* personal representative, and the husband may take them as such; but then they must be applied in a due course of administration, and consequently in discharge of the debts, if any, owing by the wife, under contracts made by *her while sole*." 3 Pres. Abs. 349. Though the husband be not as such of kin to his wife (*Watt v. Watt*, 3 Ves. 244. 14 ib. 382, and *Bailey v. Wright*, 18 ib. 49), yet, since the statute of distributions does not extend to the estate of a *feme covert*, he will be entitled to her personal estate *jure mariti*, and exclude every other person. 29 Car. 2. c. 3. s. 25. 2 Bl. Com. 515. In *Squibb v. Wynne*, 1 P. Wms. 379, where a *feme covert* who was possessed of choses in action died, and her husband administered and made a voluntary assignment, *this* was held to be an alteration of the property and a reduction of the chose in action into possession. The reporter adds, see *Cart v. Rees*, in Michaelmas 1718, where this stronger case happened (*viz.*). A wife died possessed of choses in action, and the husband survived, and died without taking out letters of administration to his wife, after which, the next of kin of the wife administered to her, and Lord Parker held, that the administrator to the wife was but a trustee for the executor of the husband, the right to the wife's choses in action being, by the statute of distribution, vested in the husband, as *next of kin to the wife*. The same principle was acknowledged by Lord Hardwicke without any reference to *Cart v. Rees* in *Elliott v. Cullier*, 3 Atk. 526, where it was held, that if a husband die before he administer to his wife's personal estate, it shall not go to her next of kin but to his representative.

And choses in action without letters of administration.

were the construction to be otherwise, the husband of the wife intestate would be in a worse case than the next of kin, though never so remote, which was not the intent of the statute.

The husband must actually reduce a mortgage to which he is entitled in right of his wife into possession, by procuring payment thereof; or an alienation of it by him will not be binding upon her after his death, *unless it be made for a valuable consideration*; for if it be otherwise, and he die, she surviving, such mortgage will go to her as a *chose* in action, and not to his executor. Thus where the plaintiff's testator having married the sister of the defendant (f), whose portion was secured to her by a *mortgage in fee* of part of the defendant's estate, after marriage made an assignment of his interest in the mortgage; and, by articles between him and several trustees therein named, the money was to be called in and invested in land, to be settled to the use of the husband and wife and their issue, remainder to the right heirs of the husband. The husband and wife being both dead without issue, the plaintiff claimed the benefit of the mortgage by virtue of the articles, as entitled under the husband. But the court dismissed the bill, because the mortgage being put in the nature of a *chose* in action, the husband had not an absolute power over it, but only a right to reduce it into possession, which not having done, his assignee stood but in the place of the husband, and could have no greater right or power than the husband himself had, and that was only to reduce it into possession in his life-time, and he having neglected so to do, it survived to the wife, notwithstanding the articles, and must go to her administrator (k).

Husband's release of wife's mortgage in fee not a reduction of it into possession, unless made for a valuable consideration.

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(f) *Burnet v. Kinnaston*, 2 Vern. temp. Talb. 168 to 170. 1 Atk. 280. 401, et vide S. L. Pre. Ch. 118. 3 P. 459. 2 Atk. 207. 9 Ves. 98. 12 ibid. Wms. 200. [and see 2 Freem. 239. 178, and 2 Madd. Rep. 16.—Ed.] 2 Vern. 68. Gilb. Eq. Ca. 98. Ca.

(K) The distinction here taken between a voluntary assignment and an assignment for valuable consideration, the wife surviving being bound by the latter, though not by the former, appears to be good law. It was acknowledged by Sir W. Grant, M. R. in *Mitford v. Mitford*, 9 Ves. 99, and was said by him to have been adhered to and acted on ever since the determination of the case quoted by the learned author. By the report of the principal case

Cases in text good law.

Or unless made after he has obtained possession by ejectment.

But it seems reasonable to presume (g), that if the husband brings an ejectment, and gets into possession of an estate mortgaged, a voluntary assignment of the mortgage by the husband would alter the property; for that case appears to be in a great degree analogous to the case of an extent on the wife's judgment, which clearly is such a possession of the debt as vests it in the husband to dispose of it at his will and pleasure (L).

(g) Vide 3 P. Wms. 200.

In Pre. Ch. 119, it appears that the husband survived the wife, and took out letters of administration to her effects; and having devined this interest died, and the contest was between the devisee of the husband and the administrator *de bonis non* of the wife.

Husband may assign wife's mortgage for years, but not her mortgage in fee. (Sed qu.)

If the mortgage in *Burnet v. Kinnaston* had been a mortgage for years, the husband, it has been thought, might have disposed of it under the rule laid down in *Sir Edward Turner's* case, cited ante, vol. i. 473, in the text, and then the consideration would not have been material. See Mr. Raithby's note (1) to 2 Vern. 402. But this seems doubtful law; and it is observable that nothing in the form of decision or dicta appears on the point. If the term be vested in trustees, it is a doctrine very difficult to be maintained; for to hold that the husband's assignment would deprive the wife of the mortgage-money, on the ground of such assignment being, in fact, the assignment of a term of years, would be to make the mortgage term the principal, and the money the accessory, which cannot be admitted. A modern writer, of much reputation, remarks, "But money of the wife secured upon a mortgage in fee, is not equally in the husband's power as money secured by a term of years, so that the decisions in regard to the two are different; for a mortgage in fee the husband cannot dispose of. The estate, therefore, continuing in the wife, carries to her surviving, the money along with it. The security, then, not being assignable without her concurrence, the debt classes among her *equitable choses in action*." See 1 Rop. Bar. & Fem. 221. That money due on mortgage belonging to the wife should be classed among her *equitable choses in action* may be true, and this it will be well to remember in reference to the positions advanced in the sequel of this chapter. But that the wife's mortgage in fee, or rather that money belonging to the wife secured by a mortgage in fee, is such a chose in action that the husband cannot dispose of by assignment for valuable consideration (abating its repugnance to all principle), seems incidentally to have been denied by great authority in *Bosvil v. Brander*, the case next quoted by the learned author in the text. In that case the assignment of commissioners of bankrupt passed the money due on the wife's mortgage in fee to the assignees; and the court declared that as to the legal estate which remained in the wife, she was as to that a trustee for the assignees.

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Voluntary assignment after ejectment, considered insupportable.

(L) A verdict obtained by the husband in an ejectment against the tenants in possession of the premises, whereon the wife's chose in action is secured, would not, it is conceived, be of itself a sufficient act on the part of the husband to reduce the chose in action into possession; for the money being

Although a mortgage, to which the husband is entitled in right of his wife, will survive to her in case of his death as against his executors or assignees to his use; yet if his creditors get possession thereof, and thereby oblige her to apply to a Court of Equity for aid, the court will not interpose its authority to take the benefit from them. Thus where a *feme sole (h)*, mortgagee in fee for 800*l.* had married a tradesman who became a bankrupt, on a commission of bankruptcy being taken out against him, the commissioners had assigned over all his estate, real and personal, which included this mortgage. Afterwards, the husband being dead, and the writings relating to the mortgage being in the assignee's hands, a bill was brought by the widow of a bankrupt against the assignees for them, and to have the benefit of the mortgage. But it was held by his Honor, the Master of the Rolls, that the widow being plaintiff against the assignees, so that she and not they, sought aid in equity (M), and there being in the

Husband becoming bankrupt, assignment to assignees, a reduction of wife's mortgage into possession for benefit of husband's creditors.

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(A) *Bosvil v. Brander*, 1 P. Wms. 458; ante, 749. Et vide *Lord Carteret v. Pascal*, 3 ib. 197, [where it was held that a voluntary assignment by a husband of an interest in lands (analogous to an estate by elegit), which his wife was entitled to under a decree of equity, was good.—Ed.]

still due on the mortgage, it is, notwithstanding the ejectment, a chose in action belonging to the wife. The only alteration effected by the ejectment is, that the husband receives the rents of the estate instead of the interest of the mortgage money; and receipt of interest, we have seen, ante, p. 746, n. (H) will not alone be enough to reduce a mortgage belonging or accruing to the wife into possession. If this reasoning can be depended on, there is little weight in the learned author's argument, from the analogy which this case is said to bear to that of an extent on the wife's judgment, because in that instance the money is actually paid or adjudged to be paid to the husband, which is, or is equivalent to, a receipt of the money. And it is observable, that a verdict in ejectment against the tenant in possession is widely different from a decree of foreclosure *nisi* in the husband's favor; for there the money is decreed to be paid to the husband himself within a certain time, or the mortgagor to be for ever foreclosed, and such a decree would without doubt be sufficient to carry the chose in action to the husband's representative against the wife surviving, should the husband die in the mean time. See *Forbes v. Phipps*, 1 Eden Rep. 502; and *Murray v. Elibank*, 10 Ves. 91. The consequence is, that a voluntary settlement or assignment of the wife's mortgage by the husband after judgment in ejectment cannot be looked on as the source of an unimpeachable title.

(M) This circumstance that the suit was instituted *by*, and not against the widow, seems at present to be of no consideration. Mr. Vesey in a note to *Elibank v. Montolieu*, 5 Ves. 739, n. (b), thus observes:—"The distinction

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That suit is *by* and not against widow, immaterial.

mortgage-deed a covenant to pay the mortgage-money to the wife, this debt or *chose* in action was well assigned by the commissioners to the assignees, and vested in the assignees, as plainly it was, the legal estate of the inheritance of the lands in mortgage continuing in the wife was not material, it being no more than a trust for the assignees. For the trust of the mortgage must follow the property of the debt, else the mortgagor would be in a very hard case, namely, liable to be sued by the assignees of the commissioners upon the covenant, and also in an ejectment by the wife of the mortgage, whereas the latter suit would be enjoined in equity (N).

upon which *Bosvil v. Brander* was decided in favor of the husband's assignees, and, as it seems, without giving the wife any part of the fund, [namely] that the assignees were not the plaintiffs, has certainly not been attended to in the more recent authorities; and this farther observation arises upon that case that it is questionable whether it could afford a ground for the application of the principle upon which that distinction rests: the subject being a mortgage, with respect to which it must be remembered, that supposing the estate to be absolute at law, the mortgagee, whether as defendant to a bill of redemption, or as plaintiff in a bill of foreclosure, is forced into the Court of Chancery by the equity of the mortgagor." Et vide post, 754, 5, 6, in *notis*. In the following references the wife was plaintiff, *Car v. Taylor*, 10 Ves. 574. *Coysegame, Ex parte*, 1 Atk. 192. *Meals v. Meals*, 1 Dick. 373.

Wife's choses in action pass by assignment in bankruptcy or insolvency, but not her reversionary interests.

(N) The principle to be deduced from this case is, that if a wife before her marriage has a debt due to her by mortgage, it will pass absolutely by the assignment under a commission of bankrupt against her husband, unless the assignees are obliged to seek the aid of a court of equity, who will compel them to do the usual equity in making a suitable provision for the wife, if that was not done at the time of the marriage. And *this* may be advanced as good law at the present day, see 1 Christ. B. L. p. 488. What interests of the wife so vest in the husband as to belong to his assignees upon a bankruptcy, was the leading question in dispute in *Saddington v. Kinsman*, 1 Bro. C. C. 43, a case which was compromised without a decree. The law however seems to be now settled, that the general assignment either in bankruptcy, or under the insolvent act, does not operate as a reduction into possession of a surviving wife's reversionary interest in personal property, and that the courts are now anxious to protect the reversionary interests of feme covert. See *Gayner v. Wilkinson*, 2 Dick. 491. S. C. 1 Bro. C. C. 49, n. (†). *Pringle v. Hodgson*, 3 Ves. 617. *Mitford v. Mitford*, 9 *ibid*. 98. *Woodlands v. Crowther*, 12 *ibid*. 174. *Hornby v. Lee*, 2 Madd. Rep. 16. *Nash v. Nash*, *ibid*. 133. *Picard v. Roberts*, 3 Madd. 384. Sed vide 10 Ves. 586. 1 Christ. B. L. 270; and Mr. Canning's observations on the question, how far a contingent or reversionary interest of husband and wife in her right in personal estate is assignable in deed, or in law, during the coverture, 1820.

But if there had been any articles before the marriage (z), purporting that this mortgage-money should have continued in the wife as her provision, or should have been assigned in trust for her, they would have been a specific lien thereupon, and have preserved it from the bankruptcy (o).

Except mortgage be specifically settled on wife before marriage.

In the last case the Master of the Rolls observed, that it might have been a matter of different consideration, if the assignees had been plaintiffs in equity, and desired the aid thereof to strip the widow of all that she had, towards the doing of which equity would hardly have lent any assistance; because the assignees claiming under the bankrupt husband could be in no better plight than the husband would have been; and if the husband had in equity sued for the money (j), or else prayed that the mortgagor might be foreclosed, equity, probably, would not have compelled the mortgagor to pay the money to the husband, without his making some provision for his wife; or at least the wife, by an application to the court against the husband and the mortgagor, might have prevented the payment of the money to the husband, unless some provision had been made for her.

Husband or his assignees suing in equity to obtain wife's personal property must make provision for her.

But even in that case I should apprehend (k), that, if the husband was living, the assignees of the bankrupt would be allowed the interest of the mortgage during his life, because to that he would have been entitled (p).

Husband's assignees entitled to interest at least, of wife's mortgage during husband's life.

(i) 1 P. Wms. 459. *Bennet v. Davis*, Wms. 323. Gilb. Eq. Ca. 140, and 2 P. Wms. 316. *Moor v. Mycault*, Pre. Ch. 23.

(j) Vide *Jacobson v. Williams*, 1 P. (k) *Ibid*.

(O) And if lands are left by will to a married woman for her sole and separate use, and no trustee is appointed, the husband will be considered in equity as the trustee; and if he becomes bankrupt, no interest in the premises can be conveyed to his assignees. This was the point decided by *Bennet v. Davis*, cited supra in the text, n. (i). Quære, Does not the husband's trusteeship cease with the coverture?

Husband may be trustee for wife.

(P) The learned author in the index to his fourth edition, says, "But the creditors shall have the interest during their joint lives, 780." This is perhaps the more correct mode of expressing the conception in the text, as in the instance where the husband is entitled to the interest only of the wife's

Doubtful what passes by husband's assignment of wife's equitable interest.

It appears from the surprise and disapprobation expressed by Lord Chancellor Finch (l), in the case of *Pitt v. Hunt*, at the resolution of the House of Lords, in *Sir Edward Turner's case*, that previous to that determination it had been held, as clear and settled law, "that the husband could not dispose of property held in trust for his wife, existing without *his privity*, and not created fraudulently, before marriage." And it seems still doubtful, at least, to what extent the assignment of the husband of the wife's equitable interest, except in a case of the trust of a term for years of land, is binding upon her.

Husband coming into equity for wife's personal property must settle maintenance on her (q).

It is the constant practice of the Court of Chancery to oblige a husband, who comes into equity for his wife's *personal* property (m), or any thing he claims in her right, *jure mariti*, to make a settlement upon his wife by way of jointure, or to

(l) Vide 1 Vern. 18; ante, 716.

2 Vern. 494. *Lupton v. Tempest*,

(m) Nels. Ch. Rep. 377. Skin. 288.

2 Vern. 626. 2 Ves. jnn. 562.

mortgage, he can have it but during the coverture, that is, during the joint lives of himself and wife.

Husband's assignees take annual produce of wife's property, subject to making her an allowance.

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It is clearly settled, that since the husband is obliged to maintain his wife, he will be entitled to receive the *annual* produce of her property, although he decline to make a settlement on her. And the husband being thus entitled to the whole annual income of his wife's property, his assignees in bankruptcy, or under the insolvent debtor's act, or trustees under his own assignment to pay debts, will, as representing him, be entitled to receive such income; out of which they will be obliged to make a settlement or allowance to the wife for her support. Thus it was distinctly held, in *Pryor v. Hill*, 4 Bro. C. C. 139, that the assignees under a general assignment for the benefit of the husband's creditors, should not take dividends settled on the insolvent's wife for her life, unless they would make a provision for the wife. So Lord Alvanley held, in *Brown v. Clarke*, 3 Ves. 166, that assignees of a bankrupt, taking his wife's fortune out of the court, must make a provision for her; and, in that case, they consented to give her half. His Lordship was of the same opinion in *Lumb v. Milnes*, 5 Ves. 517. And Sir W. Grant, M. R. in *Wright v. Morley*, 11 Ves. 21, after reviewing the principal authorities, said the result was, that the wife's life interest passed to the assignees, subject to the ordinary equity for a settlement.

Established rule (though of doubtful policy) that wife is entitled to provision for property which she brings her husband.

(Q) This is a very old head of equity. It is adverted to by Lord Keeper Coventry, in *Tanfield v. Davenport*, Toth. 114. But Lord King said he thought it extraordinary that the Court of Chancery should interpose against the husband in cases where the law gave him a title to the wife's personal estate; and undoubted experience had shewn, that such interposition, unless where the husband had appeared to be a profligate or extravagant man, had been the

secure a maintenance for her in case she outlives him, and the court will not interfere till that be done, not even where she is a party to the suit. And it will make no difference, though there be other provisions for the wife's separate use before marriage, yet if a great accession afterwards comes, the court will not suffer the husband to exhaust it (n) (R).

(n) Per Lord Hardwicke, 2 Ves. jun. 593. *Burdon v. Dean*, 2 Ves. jun. 607.

occasion rather of mischief than of good. *Milner v. Colmer*, 2 P. Wms. 641. Lord Cowper too thought the doctrine broke in upon the legal title which the husband had to his wife's personal estate; and the method, however intended originally as a cautionary provision in favor of the wife, had sometimes proved inconvenient; nevertheless custom and long usage had sufficiently established it, and his Lordship could not take upon himself to alter it. *Brown v. Elton*, 3 P. Wms. 205. The first Vice-Chancellor (Sir T. Plumer) also said it was difficult to discover the ground of the wife's equity, see *Lloyd v. Williams*, 1 Madd. Rep. 458. This equity however is now clearly established, not only against the husband personally, but against all persons claiming under him, whether by operation of law or otherwise. 1 Madd. Ch. 480.

(R) In *Burdon v. Dean*, 2 Ves. jun. 607, the wife being entitled to 1000*l.* under her father's marriage settlement, it was prior to her marriage settled thus:—500*l.* of it were to be paid to the husband, and the residue to be settled upon herself and children. The wife being entitled to other property, no notice was taken of it in the settlement. The husband having become bankrupt, the question was, whether she was entitled to a provision out of such other property as against the assignees, or was barred of that equity in the provision made for her by the settlement? Lord Alvanley decided, that the settlement did not bar her right to a provision out of her other property; and his Lordship admitted that the equity of a wife to have a provision out of her trust property claimed by the husband, attached upon newly-acquired property as well as upon property which belonged to her before marriage; but his Lordship doubted whether the wife's equity had been extended to a trust of real estate, to which the wife may be entitled for life.—There is good reason, it is apprehended, for this doubt.

Lord Rosslyn, C. put the rule on this principle, that where the persons claiming in right of the husband, however meritorious their consideration, are obliged to come to an equitable jurisdiction to obtain the benefit of any part of the property, the destination of which is for the enjoyment of the husband and wife, the court will not apply it to the use of the husband only, leaving the wife to starve. *Oswell v. Probert*, 2 Ves. jun. 682. The same law was distinctly acknowledged in *Freeman v. Parsley*, 3 Ves. 424; and in *Milnes v. Lamb*, 5 *ibid.* 517.

From the language of some of the cases, it should appear that the jurisdiction of the court is confined to cases where the husband or the persons claiming under him are plaintiffs, see ante, 752, n. (M). It is however now settled, that the wife by her next friend may file a bill on her own account,

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Wife's equity for a provision applies to newly acquired property, as well as to that possessed before marriage, but not to trust of real estate.

Lord Rosslyn's expression of rule.

Wife's equity so far settled that she may file a bill to enforce it, though she

And a court of equity, where it was in proof that a husband had ill-treated his wife, decreed the interest of money,

have settlement before marriage which is inadequate, or which was not intended to embrace future acquisitions.

which the court will entertain if the subject be of equitable, not of legal cognizance. Thus, in *Lady Elibank v. Montolieu*, 5 Ves. 737, Lady Cranstown died intestate; possessed of large personal property; leaving two brothers and two sisters her next of kin. Lewis Montolieu, one of her brothers, took out letters of administration to her. The bill was filed by Lady Elibank, one of the sisters of Lady C., against her husband Lord Elibank, and against Montolieu the administrator, praying an account of the plaintiff's share, and that it might be settled on her and her family. Montolieu, by his answer, insisted upon retaining the plaintiff's share towards satisfaction of a debt due to him from the plaintiff's husband, on the ground of a provision made for her by settlement previous to her marriage with Lord Elibank; but that settlement, it was proved, was not adequate to her fortune, and appeared to have been made upon the expectation, that by circumstances to occur in the family there would be an opportunity to do better for her ladyship at a future period. The question was, whether the plaintiff was entitled to the relief prayed by her bill, as against Montolieu the administrator, under the circumstances stated? Lord Rosslyn said he wished to consider the case. On a future day his Lordship delivered judgment as follows:—"The only difficulty I had in this case was upon the form of the suit; whether a married woman by her next friend could be the plaintiff in this court. With respect to the point made by the answer of Montolieu, that he had a right to retain against the debt of the husband, being possessed of the fund as administrator, and the wife being one of the next of kin, I am clearly of opinion the defendant had no right to retain. The administrator is trustee for the next of kin: the plaintiff being one of them, if she has any equity against her husband with regard to this money, that equity will clearly bar any right of retainer he can set up to the property, of which he became administrator. With respect to the only difficulty I had upon the point of form, if she is entitled, and there is no way of asserting her right against her husband except by a bill, that objection, I think, does not weigh much. If the defendant Montolieu had done what would have been the natural thing, and the right thing, and what he certainly would have done, but for his own interest, he would have been the plaintiff, desiring the court to dispose of the fund for the benefit of Lady Elibank, or to protect her interest in it. Then, upon all the circumstances, it is very clear, if it had come before the court, it would have been matter of course to have pronounced on her equity on the bill of the administrator, praying that the money in his hands might be properly disposed of; and I would not have suffered this money to be paid to Lord Elibank without making a provision for her; for the provision upon her marriage was clearly not adequate to her fortune; and it is clear that provision was made upon the expectation, that by circumstances to occur in his family, there would be an opportunity to do better for her at a future period. The difficulty is, that it is very unusual in point of form, the bill coming on the part of the wife instead of the husband." Declare therefore, added Lord Rosslyn, "that the defendant Montolieu is not entitled to retain the plaintiff's share in satisfaction of her hus-

part of her portion, to be paid her for her separate maintenance (o) (a).

(a) *Lady Oxenden v Sir James Oxenden*, 2 Vern. 493.

band's debt; but that such distributive share of Lady Cranstown's fortune accruing to the plaintiff, as one of her next of kin, is subject to a farther provision in favor of the plaintiff and her children; the settlement made upon her marriage being inadequate to the fortune she then possessed. And let it be referred to the Master to take the accounts, and to see that a proper settlement is made on the plaintiff and her children; regard being had to the extent of her fortune and the settlement already made upon her."

It is also observable, that in *Ellis v. Ellis*, (1 Supp. Vin. Abr. 475, pl. 4) the court entertained a suit by the wife to restrain her husband from assigning or transferring for valuable consideration her equitable property, and granted an injunction, ordering the husband to make proposals for a settlement. And in *Roberts v. Roberts*, 2 Cox's Rep. 422, the Master of the Rolls granted an injunction for the like purpose, in order to prevent the necessity of new parties. But he said he desired to be understood, that he did not make the order under an idea that a purchaser or assignee of the husband for valuable consideration of the wife's property, could put himself in a better situation than the husband; and his Honor added, that the more he thought upon the subject the more he was satisfied that such an assignee must be subject to the same equity. But the principle for granting the injunction in the two last cases, says Mr. Roper (1 Rep. Bar. & Fem. 260) is very questionable; for if the husband had a right to sell his wife's equitable choses in action, there is no reason why he should be prevented. And in *Pulvertoft v. Pulvertoft*, 12 Ves. 84, Lord Eldon refused to enjoin the husband from selling property of which he had previously made a voluntary settlement, after marriage, upon his wife and children.

And in mean time court will restrain husband from assigning. Sed quæ.

(S) The case was this:—By articles on the marriage of A., with B. her husband, the sum of 6000*l.*, part of her fortune, was agreed to be laid out in lands, and settled on B. for life, then on A. for life, with remainders over in strict settlement. The money was left in the bank till the purchase could be made, subject to the trusts. A. being obliged to leave B. in consequence of his cruel and unhandsome treatment, filed a bill for the performance of the marriage contract, and to have an allowance for maintenance, and a cross bill was filed by B. to have the money placed out at interest, until a purchase could be made. The ill treatment of the wife having been fully proved, the court decreed the 6000*l.* to be laid out, with her consent, in a purchase, and settled pursuant to the articles, and the interest in the mean time to be paid to her, so long as she lived separate.—In this case it is observable, that the court deprived the husband of the interest of his wife's fortune, although it was directed by the articles to be paid to him for life. On the same principle were decided the cases of *Williams v. Callow*, 2 Vern. 752. *Watkins v. Watkins*, 2 Atk. 96. *Sleech v. Thorington*, 2 Ves. 562. *Atherton v. Nowell*, 1 Cox C. C. 229; and *Wright v. Morley*, 11 Ves. 93. These cases proceed on the ground, that the law having given to the husband the personal estate of his wife, to enable him to maintain her and the children of the marriage, it fol-

Wife entitled to settlement if her husband so treats her as to compel her to desert him.

Same law if husband, or his assignee sues for wife's property which is in trustee's hands.

And it has been settled by a variety of cases, that where property of the wife is in the hands of trustees or in a court of equity, and cannot be attained but in equity, assignees at law, or assignees of the husband's general property, have not a better interest than he has (*p*); and therefore the court will not extend its arm to give such general assignees any part of the wife's property which they cannot come at without the intervention of the court, unless they offer a consideration by way of allowance out of it for her. Such court considering the property which the husband takes in right of his wife, as in itself a provision for the maintenance of both by a title that gives him and her a joint enjoyment.

Same law against assignees of bankrupt.

Upon this ground a court of equity refuses its aid to assignees of a bankrupt, to enable them to procure trust money, which they cannot come at, but by application to such court to act against the trustees, unless they offer to make a reasonable and proper provision thereout for her (*q*).

Bill of wife for annuity bond detained by her husband's assignees in bankruptcy decreed, unless they will make provision for her.

Thus, where A. married B. who became a bankrupt (*r*), and at the time of his last examination, he delivered up, with the rest of his estate, a bond which was given to A., *in trust* to secure the payment of an annuity of 40*l.* a year to A., during the joint lives of herself and another person. She brought a portion of 500*l.* to the bankrupt, and had nothing to subsist

(*p*) Vide *Ball v. Montgomery*, 4 Bro. C. C. 339. 2 Ves. jun. 191.

(*q*) *Bosville v. Brander*, 1 P. Wms. 458. *Ex parte Coysegame*, 1 Atk. 192. *Grey v. Kentish*, *ibid.* 180. *Jacobson v. Williams*, 1 P. Wms. 383. [*Miles v. Williams*, *ibid.* 249.] *Worrall v. Marlar*, *ibid.* 4th edit. 459, n. (1). *Oswell v. Probert*, 2 Ves. jun. 680. *Burden v. Dean*, *ibid.* 607. *Freeman v. Parsley*, 3 *ibid.* 421. *Pringle v. Hodgson*, *ib.* 618, [et per Lord Rosslyn, in this latter case, "the assignee

at law has a right to the chose in action of the wife; and the law reduces it into possession. The bankrupt laws give over all that the husband had or could dispose of to the assignees." This was cited and approved of by Sir W. Grant, in *Mitford v. Mitford*, 9 Ves. 98, who added, "the property is vested by law in the assignees, and the question of survivorship is quite laid aside by the bankruptcy."—Ed.]

(*r*) *Ex parte Coysegame*, 1 Atk. 237. 1 Co. Bank. Laws, 323.

lows, of a consequence, that if he desert her and leave her destitute, or compel her to leave him from cruel treatment or gross misbehaviour, his interest in her personal property will be suspended.

on but this annuity, and prayed by her petition, that the assignees might deliver the bond to her trustee, and that the arrears of the annuity and all future payments might be paid to her. And the Lord Chancellor ordered accordingly, considering the creditors as standing in the place of the husband, and not entitled any more than he would have been, in case he was no bankrupt, to the annuity, without making a provision for her.

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In this case, Lord Hardwicke seems to have considered [the whole of] this annuity as no more than a fair provision out of the wife's portion (T).

And the same principle applies to trustees of the property of a person whose wife is entitled to personal property, so predicamented, under a general assignment.

Husband's assignee in bankruptcy, or under deed of trust, entitled to wife's separate estate on making provision for her.

(T) As to the quantum of provision for the wife in these cases, the usual course appears to be to allow her *half* the property in dispute, as between herself and assignees in bankruptcy. *Brown v. Clark*, 3 Ves. 168. *Pringle v. Hodgson*, ib. 620. *Wright v. Morley*, ib. 121; but whether a different proportion would be decreed against a purchaser for value, no case warrants even a conjecture. Indeed, the point itself, that a wife is entitled to a provision against a purchaser, is not yet finally settled, see post, 796, *in notis*. In *Oswell v. Probert*, 2 Ves. jun. 683, where the wife was entitled to the interest only for her life, Lord Rosslyn said, it was not easy to divide an income, for half an income was not a maintenance. Creditors were extremely handsome upon these occasions. It was much better to refer it to them. His Lordship did not like to judge of it. "Declare, therefore," he added, "that the interest of the bank annuities belong to the wife for life; and that a provision is to be made for her, and refer it to the Master for a proposal." Lord Hardwicke, indeed, in *Coysegame, Ex parte*, 1 Atk. 192, gave the wife, against the assignees of the bankrupt, the *whole* of the annuity belonging to her before marriage. Also, in *Vandenanker v. Desborough*, 2 Vern. 96, the Court gave the *whole* to the wife against the assignees. But these cases have not been followed by the modern determinations. Where on a bill filed by the assignees of the bankrupt, to recover money to which the bankrupt was entitled in right of his wife, the usual reference was made to the Master to consider of proposals for a settlement on the wife and children, the Master approved of a settlement of the *whole* property on the wife and children. Exceptions were taken to his report, and *allowed*, and the Master was directed to review his report, *Beresford v. Hobson*, 1 Madd. Rep. 362; and note, the proposal to the Master must be made by the assignees, *Lamb v. Milnes*, 5 Ves. 521.

As a general rule, wife's provision to consist of half her property, or income.

Thus, where a sum of money was devised in trust to be placed out at interest (*s*), and the interest to be paid after the death of the testator's niece S. T. without leaving children to the defendant C. M. during her life, and after her decease the principal to go to her children. S. T. died in the life of the testator, without children. The husband of C. M. being indebted to several persons, made a general assignment to the plaintiffs as trustees of his stock in trade, debts, and *other effects whatsoever* in trust for themselves and the rest of the creditors. Afterwards the plaintiffs filed their bill against the original trustees of the money and against C. M. and her husband praying to be paid the interest and dividends on these trust monies, until they should have been paid their full demands. The question was, whether the plaintiffs were entitled to these dividends without making a provision for C. M. for life. *Et per* his Honor the Master of the Rolls. This is a general assignment by W. M. of all his effects to the plaintiffs in trust for his creditors. And it comes to this, whether the assignees are entitled to the interest of the funds for the life of the wife. The assignment, in this case, being equivalent to an assignment in law by bankruptcy, I cannot see why the court should not admit the same equity of calling on the assignees, to make a provision for her. The assignees are not entitled to the annuity without making such provision. If the parties cannot agree, I can only say, I cannot assist the assignees to get it without their making a provision.

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Assignment of all wife's property to a creditor of husband's unaided in equity, unless creditor will provide for wife.

So an assignment of *all* the wife's property to a creditor of the husband, would not be aided in equity, unless some provision were thereout made for her.

This point occurred in the case of *Jewson v. Moulson* (*t*). There V. married a lady, entitled under her father's will to one-fifth part of his whole estate, consisting of two freehold houses, &c. which was directed to be turned into money, but made no provision for her by way of settlement. Soon afterwards, V. made an assignment of all the share, which in right of his wife he was entitled to in her father's personal estate, to

(s) *Pryor v. Hill*, 4 Bro. C. C. 139.

(t) 2 Atk. 418.

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v.
Moulson.

a bond creditor, and at a subsequent period made a second assignment of his wife's share to trustees, for the benefit of all his creditors in general. During this period, the wife was under age, and the executors did no act to settle, or make any division of the father's personal estate. The question was, whether the wife, who was totally unprovided for, should not have a maintenance secured to her out of her share of her father's personal estate, before it was applied in payment of the bond creditor, and the rest of the creditors of the husband? and Lord Hardwicke said, as to the last of these assignments, it did not differ from the case of assignments of bankrupts; for it was in the case of a failing man, and fell exactly under the same reasoning of an assignment of a bankrupt's effects for his creditors in general; because here he assigned all his right, title, &c. and consequently it was exactly upon the same footing.

As to the first assignment to the bond creditor (u), to be sure, that was different from the other, and likewise differed in several circumstances from all the cases decided.

In the first place, here was a mixed fund (x), arising out of real as well as personal estate; for though the father indeed, by his will, directed the estate to be sold and turned into money, yet all the children together, when they came of age, might have said to the trustees of the will, let us take the real estate as it is, notwithstanding the testator directed it to be sold. Besides, the wife was an infant when she married, and likewise during all these transactions; and consequently, a particular object of the care of that court.

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Besides too (y), this was not an assignment of a term for years, or a specific thing, but an assignment at once of all her fortune, and which the husband could not reduce into possession, without the assistance of the Court of Chancery, neither had there been any division made, or even an account taken of the testator's estate, which could bind the parties.

(u) *Jewson v. Moulson*, 2 Atk. 418.(x) *Ibid.*(y) *Ibid.*

assignees touch the money, unless they first make a provision for the wife. I will put this case; suppose the husband living and no bankrupt, and he had paid off the 150*l.* and had died, would the representative of the husband have been entitled? I am of opinion not, as it was in the nature of a pledge, but it would have been the wife's by survivorship, or, if the husband had died without redeeming the estate of his wife, she would have been entitled to have had this estate disencumbered, and the estate would have survived to her. *The particular assignee, having taken with notice of the equity of the wife, and the assignees under the commission taking it subject to the same equity with the particular assignee. I am of opinion it is her property, and therefore shall direct the South Sea annuities to be transferred to her* (v).

And the cases of *Tudor v. Samyne* before-mentioned (e), and *Povey v. Amhurst*, are cited in support of this distinction.

The facts, in the latter case, were as follow:

Creditor obtaining assignment from husband of part of wife's legacy, decreed to be first satisfied, and residue (if any) to be settled on wife.

A. had, by his will (f), given 1000*l.* to B. whilst sole, afterwards, on her marriage with C. it was agreed, that 700*l.* of this legacy should be applied towards payment of his debts. After the marriage, C. without his wife, assigned the remaining 300*l.* to the plaintiffs, who were creditors likewise, and they brought this bill against C. and his wife, and the executors of A., to have a satisfaction of their debts out of the remaining

(e) Ante, 720, 1.

Pre. Ch. 325. S. C. Gilb. Eq. Ca.

(f) *Povey v. Brown and Amhurst*, 80.

Correction of case in text.

(U) Lord Bathurst, C. in *Gayner v. Wilkinson*, 2 Dick. 494, said, this case of *Grey v. Kentish*, was "arrant nonsense," as reported by Atkyns—the report from whence the text is taken. Some of the mistakes are corrected by Mr. Cox, in his edition of P. Wms., see 1 P. Wms. 458, n. (1). Thus, the husband of Elizabeth Kentish is supposed by the report in Atkyns to be the bankrupt, whereas it appears by the Register's Book, that the bankrupt was one Crispe, who married one of the two children of Elizabeth Kentish, and who made the assignment to Barratt (as mentioned in the report), in the mother's life-time, and Crispe having died before the mother, his wife upon her mother's death petitioned to have her share of the South Sea annuities transferred to her, which was ordered accordingly, notwithstanding the opposition of the general assignees of Crispe. Reg. Lib. A. 1748, fo. 533.

300*l.*, and it was decreed, that an account should be taken, and, upon the plaintiffs proving themselves real creditors, and that the assignment was *bonâ fide*, they were to have a satisfaction accordingly, and the residue, if any, of the 300*l.* was to be paid out for the benefit of the wife.

And Lord Thurlow, in the case of *Worral v. Marlar*, and *Bushman v. Pell* (g), seems to favor this distinction, for he said that he had considered the several cases upon the subject, and did not find it any where decided; that if the husband made an *actual* assignment by *contract* for a *valuable consideration*, the assignee should be bound to make any provision for the wife out of the property assigned; but that a court of equity had much greater consideration for an assignment actually made by contract, than for an assignment by mere operation of law; for, as to the *latter*, his Lordship's opinion was, that when the equitable interest of the wife was transferred to the creditor of the husband, by mere operation of law, he stood exactly in the place of the husband, and was subject precisely to the same equity in respect of the wife.

Lord Thurlow was of opinion that wife not entitled to a settlement against husband's assignee for value (gg).

But in may be observed, in answer to these cases, that in *Grey v. Kentish*, the question arose on a future and contingent interest, which, by the death of the husband, before the contingencies, survived to the wife; the case of *Tudor v. Samyns* being an assignment of a term for years, was governed by the resolution in *Sir Edward Turner's case*; and the case of *Povey v. Amhurst* (h), was probably determined upon the ground, that the legacy was *then* considered as a chose in action, and so recoverable at law by the husband; but it has been of late decided, that this was an erroneous opinion; that courts of law have no jurisdiction over this subject; and that an action for a legacy cannot be supported (x); and

Observation on *Grey v. Kentish*.

(g) Vide 1 Cox P. Wms. 459, note (1).

(gg) [The contrary was settled before Lord Thurlow's time, see *infra*, p. 765, in *notis.*—Ed.]

(h) Vide 2 Atk. 180.

(X) An action does not now lie by a husband for a legacy in right of his wife, though such an action might have been maintained at one time, per Lord Rosslyn, in *Blount v. Bestland*, 5 Ves. 516.

the Master of the Rolls, in the case of *Like v. Beresford* (i), denied the authority of this case on that ground.

Reference to
unreported case
of *Salisbury v.*
Newton.

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And although there is no case in print, in which the first point to which allusion was made by Lord Thurlow, in the before-mentioned cases, has been decided, yet I have great reason to think that this question was determined by Lord Keeper Henley, in the case of the *Earl of Salisbury v. Newton, et al* (k) which came before the court, the 2d of July, 1759. It appears, from the Register's minutes, that the end of the bill filed in this case (l), was to have the fifth part of the personal estate, and of the money arising by sale of the real estate of John Blewit, deceased, to which William Durham, the husband of the defendant Ann, was entitled in right of his wife, applied towards satisfaction of the plaintiff's debt of 1594*l.* 15*s.* 11½*d.* and interest, and if not sufficient to satisfy the same, to have the real estate of William Durham sold. *Et per curiam*, let it be referred to the Master to inquire what fortune the defendant, Catharine Durham, the widow, is entitled to, either by virtue of the will of James Blewit, her father, or under the articles made antecedent, upon, or after his marriage, and to make her election before the Master, whether she is to take under the will of the father, or under the articles. Let the Master see whether W. Durham, deceased, the husband of the said defendant, Catharine Durham, hath made any settlement or provision for her or her children; and if not, let the Master consider what will be a proper provision to be made, by or out of her fortune, upon her and

(i) 3 Ves. 512.

(l) Et vide *Wenman v. Mason* (Y),

(k) *Earl of Salisbury v. Newton*, Trin. Vac. 1765, stated 1 Cox, P. Wms. 5th edit. 459, in note.
[see the note to p. 765.—Ed.]

Wife entitled
to settlement
against assign-
ees for value.

(Y) This case, as stated by Mr. Cox, is long and complicated. It appears, that the husband and his wife assigned her interest in a legacy to secure to A. 300*l.* which A. became liable to pay in consequence of his being surety for the husband in a bond for that sum. Upon the bill of A. against the husband and wife, and the assignees under a commission of bankruptcy which had issued against the husband, for payment of this debt out of the wife's share in her legacy, it was so decreed, subject to the settlement of a part upon the wife and children. 1 Cox's P. Wms. ubi supra.

her children, and the Master is to state the same, with his opinion thereon, to the Court; and thereupon such further order shall be made, relating thereto, as shall be just; and the reference proceeds and gives a variety of other directions. But though, from the nature of these directions, no doubt can be had but that this case must have come on again for further directions, yet, upon an inspection of the Register's Book, nothing further is to be found of this cause.

Salisbury
v.
Newton.

But among several manuscript cases collected by the late Mr. Fearne on this subject, and which induced me to inquire after this case, I find the case and judgment thereon stated as follows:

Salisbury.—Trinity Term, 1759. "A married woman being entitled to a certain sum of money in the hands of trustees or executors, the husband having made no provision for his wife and children, and being in debt to the Earl of Salisbury, assigns over this money to a trustee of the Earl in trust for the Earl. The husband after dies, without making a provision for his wife and children, and the trustees refuse to pay this money to the Earl, and for which a bill was brought. But the Keeper refused to give him any relief, as no settlement was made by the husband on his wife and children, and the Earl could be in no better case than the husband, who, if he had applied to the court for this money, the court would have put terms on him" (z).

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(Z) This case has been lately reported by Mr. Eden, and is decidedly hostile to the supposition of the learned author, as expressed in pages 763, 4, who, however, was not without much authority for his opinion. This appears to be the first case which distinctly established the equity of the wife to a provision out of her own fortune, against the particular assignee of her husband for valuable consideration. It was to the following effect:—The defendant, Mrs. Durham, was entitled to the sum of 2000*l.* as her portion under her father's marriage settlement, or to a legacy of 600*l.* under his will, which was given to her in lien and satisfaction of her portion. Her husband being indebted by bond to the plaintiff, assigned to Sir M. L. in trust for the plaintiff, all and every thing he was entitled to, in right of his wife, for payment and satisfaction of the said bond, and died without making any provision for his wife and children. The bill was filed against the wife's trustee for an assignment. Et per Lord Keeper Henley:—If the husband himself had come

Wife entitled to provision against particular assignee of husband, who, for value, had assigned the whole equitable interest of his wife with other property of his own generally.

Husband's assignment no bar to wife's equity.

And in the case of *Pope v. Crashaw* (m), his Honor said, he hoped it would be understood that a husband could not, by assigning his wife's property, bar her of any equity she might have in it: that he should never subscribe to the contrary doctrine.

(m) 4 Bro. C. C. 326.

P. 765
continued.

into this court, the court would have compelled him to make a settlement, and his assignee cannot be in a better situation than he himself would have been in. The assignees of a bankrupt have an assignment of his estate by an act of parliament, which is stronger than the present case; and yet if they came here for a legacy or portion due to the wife, the court will take care that a provision is made for her. Many of the cases cited are not cases of a wife unprovided for. It must, therefore, be referred to the Master, for the widow to make her election whether to take under the will of her father, or by the articles; and that the Master may inquire if there is any settlement, and if not, that he may consider of a proper settlement and provision for the wife and children, and that the overplus, if any, be paid to the plaintiff in satisfaction of his bond. *Earl of Salisbury v. Newton*, 1 Eden, 370.

Assignment in bankruptcy no effect on wife's contingent legacy, which, during coverture, but after bankruptcy becomes vested.

In the subsequent case of *Gayner v. Wilkinson*, 2 Dick. 491. S. C. 4 Bro. C. C. 50, n. 1, Lord Bathurst, C. said, that particular assignments had sometimes been supported but not generally. No instance, however, appears in the books, where a particular assignment has been disallowed. It is probable, therefore, that his Lordship was referring to some manuscript case with which the profession are not acquainted. In *Gayner v. Wilkinson*, *ubi supra*, the question was, whether a contingent legacy of 2000*l.* given to the wife, and which during the coverture had become vested, should go to the assignees of the husband bankrupt, who died before it was reduced into possession. It is observable, that although the contingency happened during the coverture, yet it did not happen till after the assignment to the assignees of the bankrupt. 4 Bro. C. C. 50. Lord Bathurst said, he had heard of no case, where the question had been agitated between the assignees of a bankrupt and the wife, after the bankrupt's death. The case of *Wenman v. Mason*, before Lord Northington, was not in point. [This case does not appear in Mr. Eden's Reports.] He should consider this question upon the principles of law, and on those which prevailed in the Court of Chancery. Whatever a bankrupt could release or dispose of, was conveyed to the assignees by the assignment from the commissioners. In *Miles v. Williams*, 1 P. Wms. 249, a bond executed to the wife *dum sola*, was held assignable by the commissioners for two reasons; one, that the husband might assign; the other, that he might release it to the king, to bring it within the statute. There was a difference between an assignee for a consideration and the assignees of a bankrupt, because a general assignee must sue in his own name; a particular assignee must bring an action in the name of the husband. Therefore if the husband died before it was recovered, the assignee for a valuable consideration would lose all legal remedy, and must come into Chancery for its assistance. Particular assignments had been sometimes supported, but not generally. A court of equity would not strip a

And in a late case of *Macaulay v. Phillips*, his Honor, the Master of the Rolls (n), observing upon this question, said, that "many cases had been before him, which had put him upon the necessity of considering very much the right of the wife; and he was clearly of opinion, the doubt respecting the assignment of the husband, for valuable consideration, of the wife's equitable interest, was not well founded (o), with the

Husband's assignment for valuable consideration of wife's personal property in hands of trustees, no bar to wife's equity (A).

(n) 4 Ves. 19.

(o) Vide ante, [716, in notis.—Ed.]

widow and children. But be that as it might—in the case before the court, the interest of the wife was not such a legal interest as the husband could assign: he must have come into Chancery. His Lordship then cited several cases, and decreed that the wife's legacy did not pass by the assignment to the assignees.

In a case not frequently noticed in collections of authorities on this head, *Hill v. Atkinson*, at the Rolls, 26th June, 1797 (where the point came on by petition, see Mr. Vesey's n. (d) to 4 Ves. 530), the Master of the Rolls expressed himself thus:—"I have the same opinion I ever had: and the note shews Lord Thurlow could only say, that he did not find it any where decided: that if the husband makes an actual assignment by contract for a valuable consideration, the assignee should be bound to make any provision for the wife out of the property assigned. He does not say the assignee has ever obtained the property without doing so. All this court does would be perfectly nugatory, if the husband could go and sell his wife's property. Therefore I do not agree with that opinion." The Master of the Rolls added, that he would put the assignee to file a bill: but it was afterwards compromised. Et vide *Wenman v. Mason*, cited ante, p. 764, n. (Y), for a decision similar to that of *Hill v. Atkinson*.

Wife entitled to provision against purchaser for value.

Notwithstanding the express decision in the two cases of *Salisbury v. Newton* and *Hill v. Atkinson*, that a particular assignee for value must provide for the wife, Sir W. Grant, in *Mitford v. Mitford*, 9 Ves. 100, still considers the question open to discussion; and in *Wright v. Morley*, 11 Ves. 20, his Honor said, the circumstances of that case did not make it necessary to determine the much litigated question, whether the equity of the wife could be barred or affected by the husband's assignment for valuable consideration; but thus much was certain,—that if the particular assignee for valuable consideration were not in a better, at least he could not be in a worse condition, than the general assignees under a commission of bankrupt. Hence, it may be inferred, that Sir W. Grant considered the point as not permanently settled. But it should be observed, that neither *Salisbury v. Newton* nor *Hill v. Atkinson*, is mentioned in either of the cases of *Mitford v. Mitford* or *Wright v. Morley*, which engenders a belief, that his Honor was not acquainted with those determinations, at least to the extent which it now appears they may be applied.

Sir W. Grant's doubt of this doctrine unfounded. *Semb.*

(A) "To have a provision for herself and family;" per the learned author in the index to his fourth edition, title *Baron & Feme*.

single exception, perhaps, of a trust of a term of years of land, upon which, perhaps, there might be some doubt: but subject to that he was clearly of opinion, an assignment for valuable consideration would not bar the equity of the wife" (B).

Husband cannot deprive wife of her equity to a provision.

(B) And his Honor added, "It would be strange if it did, since the determinations in the courts of law with regard to an action brought against executors by the husband for a legacy due to his wife. It is determined, that the action does not lie; and the reason given is, that it would totally defeat the wife's equity. It would be whimsical then, that the assignment by the husband for valuable consideration should put the assignee in equity in a better situation than the husband himself is in at law. The guard of this court upon the wife's interest would be very singular if the husband, not being entitled at law, might assign it for a valuable consideration to another person, who would be entitled in equity. I am clearly of opinion it was only a doubt; and it never was decided that the husband could by such assignment, or any other means deprive his wife of her equity."

Lord Alcock's doubt as to wife's trust term.

With respect to the difference as to a term of years of land in trust for a married woman, the Master of the Rolls in a subsequent case, *Franco v. Franco*, 4 Ves. 528, observed, that there was a distinction, as it might be taken in execution upon a *feri facias*; but, notwithstanding he had thrown out that doubt in *Macaulay v. Phillips*, ubi supra, it might not be well founded, as he had not considered the point sufficiently to form an opinion upon it. In reference to the case of the wife's mortgage secured by a term of years, see ante, p. 750, n. (K).

Late cases.

The late cases on this subject are, *Mitford v. Mitford*, 9 Ves. 87. *Wright v. Morley*, 11 ib. 12. *Lloyd v. Williams*, 1 Madd. Rep. 450, and *Hornsby v. Lee*, 2 ib. 16.

Mitford v. Mitford, with Sir W. Grant's luminous judgment.

In *Mitford v. Mitford*, ubi supra, a late eminent Judge canvassed this question freely, yet doubted whether the wife's equity would prevail against a particular assignee for value. The circumstances of the case were shortly these:—The wife of the bankrupt was entitled to 1000*l.* after the death or marriage of C. M. In 1784 the husband became bankrupt, and within the year obtained his certificate. In 1789 C. M. married, when the legacy of 1000*l.* became due to the bankrupt's wife; in 1790 the husband died. The bill was filed by the trustee of the legacy, to have the claims of the assignees and the widow ascertained. The question was, whether the widow's right of survivorship would prevail against the assignees, who had not recovered possession before the death of the husband? Sir W. Grant, M. R. after stating the case, observed, that the bill was filed by the trustees on the opposite claims set up by the widow of the deceased bankrupt and his assignees. The widow contended, that as she had outlived her husband, who never reduced the legacy into possession, she was entitled by survivorship. The assignees stated, that the bankrupt's wife had a settlement made upon her on her marriage, so that the bankrupt became the purchaser of her fortune; and therefore they submitted, whether they were not entitled to the whole of the money: but they contended, that at all events they were entitled to it, subject to a proper

A promise by a husband to assign his wife's mortgage as a security for a debt, accompanied with a lodgment of the deeds, *Deposit of deeds belonging to wife's mort-*

settlement to be made upon her. The settlement stated to have been made by the bankrupt on his marriage did not appear, and the mere fact of there being a settlement, his Honor said, by no means proved that the husband became a purchaser of all the fortune that might afterwards come to his wife. The settlement appeared to be in consideration of her fortune, as specified and described in the deed itself; part of which was settled and part paid to the husband. So he could not be considered a purchaser of any thing more than the fortune his wife then had. If then the husband were no purchaser, as Sir W. Grant thought he was not, the trustee of the legacy had no claim whatever; the question then was entirely between the assignees and the wife. That question depended on the effect, which an assignment under a commission of bankruptcy had on the choses in action, or equitable interest of the wife of the bankrupt. Between a particular assignment for valuable consideration, and an assignment by operation of law, such a distinction had always been made, that the effect of the one was not necessarily to be inferred from that produced by the other; and it was only where the husband was dead, that the question between the wife's right by survivorship, and the right of the assignees under the commission, could arise.

Settlement no proof that husband is a purchaser.

Particular assignment for value, and assignment in bankruptcy distinguished.

"What interests survived to the wife in equity was in general determined by analogy to the rules of law. As at law her choses in action, not reduced into possession by the husband, survived to her, so her equitable interests in the same case survived to her in equity. But there were some legal interests which did not admit or stand in need of being reduced into possession: being in possession already, and not lying in action; as terms for years and other chattels real; of which the legal title was in the wife. They would survive if no act were done by the husband: but he might assign them; and such assignment would pass the legal interest, whether with or without consideration. The analogy was followed in equity. Equitable interests of the same description might be transferred in the same manner. Therefore in *Lord Carteret v. Paschall*, 3 P. W. 197, an interest in the nature of an equitable estate was bound by the voluntary assignment of the husband. With respect to choses in action, they were not assignable at law; consequently the husband's assignment could not prevent their legally surviving to the wife. In strict analogy, therefore, equitable interests, of the nature of choses in action, ought not to be affected by his assignment. But in equity a distinction seemed to have been made between a voluntary assignment and an assignment for valuable consideration. The wife surviving was not bound by her husband's voluntary assignment. That was determined in *Burnett v. Kinnaston*, 2 Vern. 401, (ante, 750), a case which had always been adhered to. But by an assignment for valuable consideration, it was said she would be bound both as to choses in action and equitable interests. *Bates v. Danby*, 2 Atk. 307, post, 770.

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Analogy between rules of law and equity as to wife's right of survivorship.

Voluntary and valuable assignment distinguished as to wife's survivorship.

"Supposing this doctrine to be established," continued his Honor, "the question then would be, whether an assignment in bankruptcy was of the same nature, and produced the same effect as an actual assignment for valuable consideration? It might seem strange that a man should in any way be able

Purchaser sometimes put in a better situation than his vendor.

gage by husband as a security for his debt, with a

although no assignment thereof be actually made, will be such a disposition of it in equity as will be good against the wife *pro tanto*.

Assignment in bankruptcy passes rights of bankrupt in same plight as he possessed them

Whether particular assignee liable to make provision for wife. Qu.

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Rule that assignees in bankruptcy must provide for wife, considered.

to transfer to another a larger or better interest than he had in himself. The husband's interest in his wife's chose in-action, or equitable interest, was only a right or power to reduce it into possession. But what was supposed to pass to an assignee for valuable consideration was the absolute right to the property, wholly freed from her contingent right by survivorship. If such were the rule, it arose from the favor which a court of equity had always shewn to such a purchaser, and it operated in many cases to put him in a better situation than the party from whom he derived his title. But was an assignee, under a commission of bankruptcy, placed in a different situation from that of the bankrupt himself? Sir W. Grant had always understood the assignment from the commissioners, like any other assignment by operation of law, passed his right precisely in the same plight and condition as he possessed them. Even where a complete legal title vested in them, and there was no notice of any equity affecting it, they took subject to whatever equity the bankrupt was liable to. This shewed they were not considered purchasers for valuable consideration in the proper sense of the words. Indeed, a distinction had been constantly taken between them and a particular assignee for a specific consideration; and the former were placed in the same class as voluntary assignees and personal representatives. In *Worral v. Marler*, ubi supra, Lord Thurlow said, a court of equity had much greater consideration for an assignment actually made by contract, than for an assignment by mere operation of law; for as to the latter, when the equitable interest of the wife was transferred to the creditor of the husband by mere operation of law, he stood exactly in the place of the husband, and was subject to precisely the same equity with respect to the wife; and accordingly, though it had been much agitated, and was not then perhaps perfectly determined whether a particular assignee were liable to make a provision for the wife out of her fortune, [see vide as to this, ante, p. 765, n. (Z)], it had been long settled, that assignees under a commission of bankruptcy, coming into a court of equity to reduce the interest of his wife into possession, were bound to make such a settlement as the husband would in the same case have been compelled to make.

“ But if the assignment had the effect of reducing the wife's interest into possession, how could this equity ever have prevailed? Out of the property which the husband had reduced into possession, no settlement could be compelled. If the assignment therefore put the assignees into possession, it would completely extinguish all claims of the wife; as the possession of the husband himself certainly did. They ought, on that principle, to be considered as coming into equity to claim what had by the assignment ceased to be a trust for the wife, and become wholly a trust for the creditors. But the court considered the assignment as doing nothing more than to place the assignees in the room of the husband. So far from treating the assignment as equivalent to possession, it was upon the very ground that the assignees wanted its assistance to reduce the property into possession, that the Court of Chancery imposed on them the condition, on which alone it would have assisted the

Thus, where D.'s wife, one of three sisters entitled to their brother's personal estate, who died intestate, and administra-

promise to assign same, binding on wife

husband to obtain the possession. It seemed to Sir W. Grant that the decisions in favor of the wife's claim, by survivorship, were most consonant to acknowledged principles with regard to the operation of assignments under the bankrupt laws."

His Honor then cited the several cases on this head (which for the most part have been previously enumerated), and continued thus:—"The case of *Grey v. Kentish* is not precisely the same in circumstances as the present; for there the husband died before the tenant for life of the legacy, of which the wife had the remainder; and consequently there was no period of his life at which it was in the power of him or his assignees to have reduced it into possession. In *Bates v. Dunby*, 2 Atk. 207, and *Hawkins v. Hobyn*, ib. 549, Lord Hardwicke held, that even a possibility of the wife might be assigned by the husband for a valuable consideration. It must therefore have been because the assignees did not claim under an assignment of that description, and not because the interest was not assignable, that the claim of the widow prevailed. In *Gayner v. Wilkinson*, the tenant for life died before the bankrupt. In that case therefore, as in this, the interest of the wife vested in possession before the husband's death. But that circumstance was not held to make any difference in favor of the assignees." On the whole, Sir W. Grant was of opinion, both on principle and on authority, that Mrs. Mitford, having survived her husband, was entitled to the legacy of 1000*l.* with the dividends thereon, from the time of her husband's death; and that the same ought to be transferred and paid to her by the plaintiff, the surviving trustee. The decree was accordingly.

Conclusion of judgment in Mitford v. Mitford.

Wife's possibility, assignable by husband for value.

The cases next in order, are those of *Wright v. Morley*, 11 Ves. 12, and *Lloyd v. Williams*, 1 Madd. Rep. 450. The former has been noticed in a preceding page, see ante, p. 796. And the latter will be mentioned in the sequel of this note.

In *Hornsby v. Lee*, 2 Madd. Rep. 16, the husband and wife assigned a reversionary interest of the wife in certain trust stock, as a security for the payment of an annuity granted by the husband. The husband afterwards took the benefit of the Insolvent Debtors' Act, and a general assignment on that occasion was made of his property. The person on whose death the wife was to take died, and then the husband died without having done any other act to reduce the stock into possession: and it was held, that the wife was entitled by survivorship to the stock, against both the particular and the general assignee. Sir T. Plumer, V. C. observed, "Independently of authority, let us consider, upon principle, whether the husband's assignment of his wife's contingent interest is good? The husband has a right to his wife's choses in action, provided he reduces them into possession. Is a deed, assigning a reversionary interest, a reduction of it into possession? Is it impossible, actually, to reduce a reversionary interest into possession. Is it then a constructive reduction into possession? The assignment puts the assignee of the husband in the same situation as the husband; and, if the husband survives the wife, the assignee is entitled to the property; but here the husband died

Wife's contingent reversionary interest in stock not reduced into possession by assignment in insolvency.

to extent of
debt.

tion was granted to two other persons, with the three sisters and their husbands (*p*); one of the administrators came to an

(*p*) *Bates v. Danby*, 2 Atk. 207.

before the wife and the assignee, the assignee therefore is not entitled to the property. This is the manner in which this case strikes me upon principle. According to *Mitford v. Mitford*, it is clear that the general assignment in bankruptcy does not pass a reversionary interest in the wife, she surviving her husband. It must be the same as to the assignment under the *Insolvent Debtors' Act*; nor do I see what answer can be given to the observation of Mr. Cooke, that a particular assignee cannot be in a better situation than an assignee under the general assignment in bankruptcy. The case cited of *Woollands v. Crowcher*, is strong to shew the insufficiency of the assignment to bar the wife's claim in case she survives her husband. On principle and authority, the plaintiff is entitled to this money."

Of children's
equity to a pro-
vision.

In these cases the wife had the option not to have any settlement made, but if a settlement is ordered to be made, it is always directed for the benefit of the wife and children. *Murray v. Elibank*, 13 Ves. 6, 7. It was formerly doubted, whether children have any substantive and independent right to claim a settlement out of the property of their mother, if a settlement had not been directed during her life-time; but if there had been a decree for a settlement on the wife and children, and the wife had done nothing to waive the equity, and died before the report, the children were always deemed entitled to be participators in the provision. *Murray v. Elibank*, supra. S. C. 10 Ves. 84. *Macaulay v. Phillips*, 4 Ves. 19, 20. *Becket v. Becket*, 1 Dick. 343. *Rose v. Jackson*, 2 ib. 604. So if the husband die after a proposal for a settlement by him, the children, it has been held, are entitled to have it carried into effect. *Gardner, Ex parte*, 2 Ves. 672. In *Scriven v. Tupeley*, Amb. 509; S. C. 2 Eden Rep. 337, Lord Northington said, the equity of compelling settlements first arose upon the husband's coming into equity for assistance. It was *personal* to the wife, and, if carried further, would be attended with ill consequences to creditors. There was no case where the court had refused assistance to the husband, after the death of the wife, upon the terms of his making a provision for the children; and thereupon his Lordship reversed a decree of Sir T. Clark's, where, after the death of the wife, his Honor had ordered her husband to make provision for an only daughter.—A case involving the same point shortly afterwards came before Sir T. Sewell, M. R., and, notwithstanding the reversal of the former decree at the Rolls, it appears from the report, that Sir T. Sewell acted in direct opposition to Lord Northington's opinion. See *Cockrill v. Phipps*, 1 Dick. 391. The point has lately been re-considered by the Vice-Chancellor Sir T. Plumer, who, after a review of all the cases, decreed that the child of a feme covert legatee has no equity to insist on a settlement after the death of the mother, unless there is a contract or a decree for a settlement in the life-time of the mother. *Lloyd v. Williams*, 1 Madd. Rep. 450. And his Honor stated the case of *Cockrill v. Phipps*, from the Register Book, whence it appears, that Mr. Dickens

They have none
after their mo-
ther's death.

agreement to divide the personal estate into thirds, a third to be allotted to each; a memorandum under the account was

report is a complete mis-statement, and that the whole transaction was foreign to the question under consideration.

It is further observable, that the equity of the wife to a provision out of her property attaches for the benefit of herself and her children on the filing of the bill, which gives the court jurisdiction as to that property, whether the bill is filed by the wife or others, but she may waive it even after a decree for a settlement before its execution; and the children are entitled to the benefit of that equity attaching upon bill filed by an executor, though the wife die before answer. *Steinmetz v. Halkin*, 1 Glyn & Jam. 64.

To sum up a few of the leading rules on this subject, it may be observed, *Summary of points.* that the wife's equity to a provision applies only to *equitable* property of the wife, that is, to such as is vested in trustees, or to such as cannot be obtained by the husband or his assignees without recourse to the jurisdiction of the Chancellor: for instances of which, see 1 Madd. Ch. 480, 481. But personal property in the hands of trustees, settled on the wife with the privity of the husband, or by third persons, without his privity, for the wife's separate use, is exempt from the husband's debts, and beyond his power. *Lockyer v. Savage*, 2 Stra. 947, and see *Brown v. Clark*, 3 Ves. 168. To such property, consequently, the doctrine is inapplicable. If a man, in consideration of his marriage and such portion as his intended wife is or *may be* entitled to, makes a settlement on her by way of jointure, then if any thing accrues due to the wife during the coverture, the husband will be entitled to it as a purchaser. But if it be not actually expressed that the settlement was made with a view to comprehend all accessions of fortune, nothing less than the most *clear implication* that it was so intended, will take away the wife's right to a provision from the assignees. And if the wife were an *infant* at the time of the marriage, even an express declaration, that the settlement was in consideration of future accessions of fortune, will not, it has been thought, bar her of a provision from the assignee, in respect of equitable property which has unexpectedly devolved on her after the marriage, and which could not be in contemplation of the parties at the time of entering into the settlement made by the husband. See *Atherley on Sett.* 304. If, therefore, on the other hand, the settlement on the wife be in consideration of her present portion or fortune only, without reference to future acquisitions, and property accrues to her during the coverture, which is not reduced into possession by the husband in his life-time, it will survive to the wife in equity as well as at law. *Garforth v. Bradley*, 2 Ves. 677. But the general assignment in bankruptcy will reduce these future acquisitions into possession for the benefit of creditors (see ante, 750, 1). Such assignment, however, operating only in equity as a release of a chose in action, the wife will be entitled to a provision for herself and family, and the assignees must make a proposal to be approved of by a Master in Chancery. And as a general rule it may be laid down, that the wife will be entitled to a settlement from her husband's assignees in every case where the husband has not acquired an *absolute* right to her equitable fortune, and whatever be the nature of the equitable property will make no difference; for the wife will be equally entitled to such settlement, whether it consist of a

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signed by all; two mortgages, one in fee and the other for a term, each for 150*l.* were allotted to D.'s wife; the legal interest was not assigned, but by the memorandum was agreed so to be. Before any assignment, D. borrowed 200*l.* of the plaintiff on note, and by agreement under note took notice that he had, the better to secure the 200*l.* left two mortgages with him, which he was entitled to, and promised forthwith to assign. Before any thing done, D. died; the plaintiff's bill was brought against the wife of D., D.'s administrator, and the mortgagors, to be paid his 200*l.* and interest, or to foreclose the mortgagors. It was argued on behalf of the wife, that the mortgages were her *choses* in action; and, not having been assigned by her husband, survived to her, or, at least, that she was entitled to them on paying the plaintiff's debt. The administrator of the husband insisted, that in equity what D. had done amounted to an assignment, and that he was entitled to redeem the plaintiff. But it was adjudged, that the agreement amongst the three sisters, and the separating the mortgages from other parts of the estate, was an appropriation of them to D. and his wife, and that D.'s heir and adminis-

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continued.

gross sum of money—the interest of money—money to arise from the sale of lands—the rents of estates—of an annuity—or, in short, of any other species of property whatsoever. And she will be entitled to a settlement, notwithstanding a part of her fortune may have been settled on her at her marriage; nor will the circumstance of her being in possession at the time of the marriage, of the very property in respect of which she claims a further settlement, take away her right to such settlement. But it is apparent she can only be entitled to a further settlement where the first does not, either expressly, or by necessary implication, give the residue of her fortune to her husband. And if the husband makes a settlement upon his wife, in respect of a certain specified part of her fortune, she will be entitled to a further settlement, against his assignees, in respect of that part of the residue which consists of equitable property; and the wife will also be entitled to a settlement, although the children of the marriage may be provided for *aliunde*. *Pryor v. Hill*, 4 Bro. C. C. 138, Belt's edit. But by the rules of court, the wife will not be entitled to a provision where the property is under 200*l.*, or 10*l.* in annual payment. See Beames' Ord. Chan. 464.

General Repertorium.

As to the bearing of this doctrine on a particular assignee, see ante, 765, n. (Z). With reference to the equity of the children, see the former part of this note. And in regard to the quantum of the provision when granted, see p. 758, n. (T). This subject is treated of by the following writers:—Mr. Christian (Bank. Laws, 488), Mr. Maddock (1 Tr. Eq. 482), Mr. Roper (1 Bar. & Feme, Ch. vii, *passim*, and 1 Tr. Leg. 379), Mr. Fonblanque (1 Tr. Eq. 97), Mr. Atherley (Tr. Sett. 300), and Mr. Thomas (3 Co. Litt. 310.)

trator were trustees for D. and his wife in the two mortgages(c): that D. being entitled in right of his wife to the trust of these mortgages, had a power to assign them for his own use: that leaving them with the plaintiff, and giving his note, promising he would procure them to be assigned, amounted in equity to a disposition of them for so much as to satisfy the debt to the plaintiff, but not for more. For though *he might* have disposed of the whole in the manner he did, *his intention* was only to secure the plaintiff's debt, which being done, the mortgages belonged to the widow as her *choses* in action, and not to the husband's administrator: that although one of the mortgages was in fee, it made no difference; for a husband might dispose of the wife's mortgage in fee, as well as of her mortgage for a term(d).

And in these cases of assignments of *choses* in action, no particular forms are necessary to be followed; for the principle which governs them is, that the transaction amounts to an agreement for a valuable consideration before hand, to lend money upon the faith of being satisfied out of the fund; and, to give effect to it, courts of equity, wherein the assignment of a *chose* in action is admitted, consider it as amounting to an assignment of so much of the debt, to effect which any words or acts evincing the intent of the parties will do, and no particular words or acts are necessary thereto. Thus, if a mortgagee were to receive the money due on a mortgage, and there was written on the back of it, "whereas I have received the principal and interest from such a one; do you, the mortgagor, pay the money to him;" this would amount to a valid assignment in equity, and the mortgagor could not pay the money to the mortgagee without making himself liable to the assignee, because he would have paid it with full notice of the assignment for valuable consideration(e).

No particular form requisite for the assignment of a chose in action.

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(C) But a legacy to a married woman was considered insufficiently reduced into possession by an appropriation, by the executrix, of a mortgage to the same amount, so as to prevent her survivorship upon her husband's death. *Blount v. Bestland*, 3 Ves. 515. Ante, 746, 751.

Mortgage appropriated for legacy, latter not reduced into possession.

(D) That the husband's agreement to assign his wife's chattel interest is equivalent to an actual disposition of it. See ante, 746, in the text.

(E) But on this ground a formal assignment should seldom be dispensed with; for it is clear that by an indorsement merely, the mortgagee will not

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Formal assignment recommended.

Husband after marriage purchases term to himself and wife, then mortgages alone. Purchase, a voluntary settlement; mortgage afterwards a good alienation, and equity of redemption, assets (F).

Where a tradesman having, *after marriage* (g), purchased a term for years to himself and his wife, and the survivor, and the executors, administrators and assigns of such survivor, for the residue of the term, mortgaged it without the wife's joining, with a proviso, that if the husband or wife, or either of them, or their or either of their executors or administrators, should pay the mortgage-money and interest at the day, then the mortgage should be void; and that until default of payment, the husband, his executors and administrators, should quietly enjoy. Seven years after he died in debt, leaving his wife executrix, and the money unpaid. The question was, whether the equity of redemption of this term was assets for the payment of the husband's debts, or it should go to the wife as survivor? And it was held by the Master of the Rolls, that the settlement on the wife, being made after marriage, was a voluntary conveyance; that being only a term for years, and consequently always in the power of the husband to forfeit or aliene, the mortgage was an alienation. For, though if the mortgage-money had been paid before the day, the mortgage would have been void, and consequently all things would have been *in statu quo*; yet the mortgage being forfeited, the equity of redemption was now become a creature of equity; and it being in the case of creditors, and the redemption given, as well to the executors of the husband as to the executors of the wife, and the last proviso being, that the husband, his executors, &c. might enjoy till default of payment, he decreed that the equity of redemption of this term should be assets.

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(g) *Watts v. Thomas*, 2 P. Wms. 364.

be divested of all his legal and equitable estate and interest in the premises. The consequence is, that on a future sale his concurrence will be necessary; and, in the case of a mortgage, he will retain the legal estate, which he may assign to a second mortgagee, and so debar the assignee of his remedy by ejectment. See farther, ante, vol. i. p. 24, *in notis*, and post, in the Third Volume.

(F) This case has been noticed before, see ante, vol. i. 290, in the text. That a voluntary settlement is not binding on a mortgagee or purchaser even with notice, see ante, 655, n. (D); and as to a mortgage in the joint names of husband and wife, see ante, p. 684, in the text.

CHAP. XVIII.

OUT OF WHAT FUND MORTGAGES ARE TO BE REDEEMED (A).

THE question, out of what fund mortgages are to be paid, must be decided by ascertaining the precise nature of a debt on mortgage, which will necessarily lead to the developement of the fund on which it is chargeable. *Introductory observations.*

From the cases to be met with in the books upon this subject, as they relate to mortgages in particular, a man would be induced to imagine that incumbrances of this kind stood upon a distinct ground, and did not fall under the general provisions of the law, respecting the payment of the debts; but that arises from the circumstance, that many of these cases were decided at periods, when the nature of a mortgage debt was not thoroughly understood. Since that has been ascertained, there is, generally speaking, very little difficulty in fixing upon the fund, which ought to be liable so pay off mortgages.

It has long been holden, that a mortgage (a), whatever be the form of the security, whether it be accompanied with, or be without, a covenant or bond for payment of the money borrowed, being in the abstract and intrinsically no more than a contract for a *borrowing* and lending, is only a debt, and the estate mortgaged is a pledge by way of additional security for the money borrowed; and, on that ground, the *Mortgagor must pay money, though estate be insufficient,*

(a) *Meynell v. Howard*, Pre. Ch. 61.

(A) It should be premised, that the subject of this Chapter relates principally to the mortgagor; for as to the mortgagee, it is obvious that he, having a mortgage and also a bond or covenant, may resort to either the real or personal estate of the mortgagor at his option. The court however may settle on which fund the debt shall ultimately fall, and the consideration of that point is the object of the present division.

mortgagor is bound to make good the money, although the land proves a defective security (B).

Debt, its nature and kinds.

A debt is a personal duty, whereby a right to a certain sum of money is mutually acquired and lost.

Debts are of several kinds, usually divided into debts of record, debts by specialty, and debts by simple contract.

Specialty debts the subject of this chapter.

The first and last of the divisions are not material to the discussion of the present division (c); I shall therefore confine my observations to that division, which includes debts by specialty, with the precise nature of which, so far as it applies to the extent of the obligation they impose, and the subjects on which they attach, the reader must be made acquainted, in order clearly to understand the *principles* upon which we must decide, out of what funds *primâ facie* mortgages, *qua* such, are to be paid.

They are debts under seal, and create no lien on real estate in debtor's life-time.

Debts by specialty, or special contract, are such, whereby a sum of money becomes, or is *acknowledged to be*, due by deed or instrument *under seal*, such as by deed of covenant, by lease reserving rent, or by bond or obligation (b). Debts

(b) The recital of a debt under specialty debt, although recited in a hand and seal has been held to be no deed (d). 1 Ves. 313.

Mortgagee a simple contract creditor as to debt alone.

(B) And although there be no covenant for the payment of the same. *Cope v. Cope*, 2 Salk. 449. So per Lord Thurlow, in *Ancaster v. Mayer*, 1 Bro. C. C. 464, if a man mortgage his estate without covenant, yet, because the money was borrowed, the mortgagee will become a simple-contract creditor, et vide S. L. post, 866, 7.

(C) *Sed quære* as to the latter division, since the mortgagee may, if he choose, consider his debt a simple-contract debt; vide last note. But if he prefer giving it that name amongst other creditors, he must, it is presumed, relinquish his security for the benefit of those creditors. See *Cope v. Cope*, 2 Salk. 450.

Recital of debt does not make it a specialty.

(D) The case to which the learned author here refers, is that of *Lecum v. Mertins*, 1 Ves. 313. S. C. on other points, 3 Atk. 1. and 1 Serj. Wils. 34. Mrs. Hay in her husband's life-time levied a fine of her estate for the purpose of making it subject to a debt of 2000*l.*, which had been contracted by her husband. After his death she borrowed a further sum of 400*l.*, and by an indorsement agreed that the estate so charged should stand pledged with this

upon mortgage likewise fall under this denomination; for mortgages are made by deeds or instruments under seal, in which the loan is *acknowledged*. Such debts by specialty, in regard that they were confirmed by special evidence under seal, were ranked in a higher degree than simple-contract debts. But whilst the debtor and creditor, and the debt, continued *in statu quo*, no material distinction followed from this superiority, in respect of the fund on which it was chargeable. The advantages in point of proof, arising from the instrument, constituted all the difference; for whether the debt commenced by specialty or simple contract, still it amounted to no more than a personal duty; it gave no lien upon the debtor's estates.

But when the debtor died, then the specialty creditor derived an essential and immediate benefit from the superior degree of his debt; because the representatives of the debtor were bound to class the debts according to their rank, *vis.* as debts of record, debts by specialty, and debts by simple contract, and to apply the funds, appropriated by law to the payment in that order, until each class was satisfied; so that debts of an inferior degree could not be paid, until debts of a superior degree had been first discharged. These two circumstances of greater convenience of proof against the debtor, and priority of payment, where the matter was adjusted by his representatives, out of the goods and chattels of the deceased (which being the security creditors depended upon, were liable in the hands of the executors or representatives of the debtor, as well as in the hands of the debtor himself) seem to have constituted the principal features, which distinguished a specialty from a simple-contract debt; for, at common law, there was

Nor after his death, unless heir be specially named; but being personal duties executor bound, though not named.

400l., and not be redeemed without payment of both sums. Lord Hardwicke said this was a case for which the court never would strain, however liberal they were in such cases in the contruction for creditors; and he said it was material to observe, that in this case it was the husband's debt; and the intent was not to change the nature of it, and to make it the wife's debt, for it was only recited in the deed; and the recital of a debt under hand and seal had been held not sufficient to make it a specialty debt, for it must stand on its own force; and his Lordship had known it so determined by Sir J. Jekyll.

Real estate exempt at common law from execution for personal duty.

no execution of land for a *personal duty* against the owner, unless in two cases (c); the one in the case of the king by his prerogative, which entitled him *ab origine regis*, to execution of body, lands, and goods; the other, in the case of the heir, if specially named in the instrument, *where otherwise the debt would have been lost*. But a specialty did not bind the heir by virtue of its *intrinsic superiority* or force, but charged him merely as comprehended in the contract, where, he was included therein by express words (d); for the heir was not, in respect of the lands having descended to him merely, chargeable for any debt or wrong, or trespass of his ancestor, though the executor was, so far as he had chattels or assets, and *that* notwithstanding he (the executor) was not named in the contract.

Origin of this exemption.

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This exemption of the land from being liable to answer the personal contracts and engagements of the tenant, was one of the accidents incidental to the introduction of the feudal law, which protected lands from all ordinary process, in order that the tenants might be the better able to answer the feudal duties to the lord, these being the life and support of that kind of Government. And as the land was not originally liable to such personal duties in the hands of the ancestor, so neither was it liable in the hands of the heir, if he was not comprehended in the contract, and bound expressly by the act of the ancestors, whereby he might be made debtor in respect of assets.

Down to Hen. 4. land a favored fund, and heir, though bound not liable, if executor had assets.

But at common law (e), from the time of Edward 2d, to that of Henry 4th, where the ancestor bound himself and his heirs expressly by specialty, the obligee, *if the executor had not assets*, might have had an action of debt against the heir, and, on judgment, became entitled to a special writ (f), whereby *all* the lands, descended to the heir, were to be delivered in execution to the debtee, who had recovered, which was a writ grounded upon the common law, and not on any

(c) Vide 2 Inst. 19. Magna Charta, Dyer, 81. 3 Co. 11 b. 12 ibid. 2. cap. 8.

(f) Dyer, 373, pl. 14. 2 Roll. Abr.

(d) Dyer, 271. a. pl. 25.

71. Ibid, pl. 2.

(e) Poph. 151. Plowd. Com. 441.

statute. However, at that period, the heir, though named, was not chargeable, if the executors had assets; for the land still remained, even at law (*g*), a favored fund, being considered only as a *dermier* security for a debt, to which the heir became subject, in respect of the contract, to the performance of which he was bound, not as debtor; but in privity, as heir, in respect of real assets descended, if the personal assets failed; for, by the common law, if the heir, before an action brought against him, had aliened the assets, the obligee was without any remedy, which would not have been the case, if the debt had been considered as due from him independent of assets. And though the action in such case was in the *debet et detinet*, and not in the *detinet* only, as in the case of an executor, that seems to have arisen from the circumstance, that the right in such case would have been destitute of a remedy, unless such writ could have been maintained, there being no other provided applicable to this case.

Therefore, down to the time of Henry the Fourth (*h*), if the heir was sued on the specialty of his ancestor, in which he was also named, and with which he was chargeable in

(*g*) 27 E. 3. 82, pl. 23.

(*h*) Fitz. Abr. tit. Dette, pl. 175. 6 H. 4. 2. b. pl. 14.

But now (if heir named) specialty creditor may elect to sue either heir or executor (*i*).

(*E*) This is good law. In *Haight v. Langham*, 3 Lev. 303, 2d edit. it was said that the obligee may charge the heir or executor at his election, or both of them, if one is not sufficient; but it is added, "debt lies not against the heir till the sheriff returns that the executor has not assets; and see 2 Inst. 253. and 7 E. 4. 13 a. for an opinion that debt does not lie against the heir, if the executors has assets." This, it is presumed, was quoted to shew that originally the obligee had not his election against the heir or executor, and not as militating against the proposition previously advanced. The doctrine conferring a discretionary power on the obligee to sue either the heir or executor, was acknowledged by Lord Hardwicke in *Galton v. Hancock*, 2 Atk. 435. S. C. post, 852. His Lordship there remarked, that the mortgagee might take his remedy against the executor, or against the heir at his election; but it was likewise to be remembered, that this election of the mortgagee would not determine which fund ought properly to be charged, nor vary the right as to those funds; and if the mortgagee or obligee were to proceed against the heir, the heir would be entitled to be re-imburshed out of the personal estate, provided there were assets in the executors hands sufficient for that purpose. *Armitage v. Metcalf*, 1 Ch. Ca. 74; et vide post, 780. But the real assets of the mortgagor will not be subject to the mortgage if there be no covenant or bond wherein the heir is specially named. See post, 866, 7, *in notis*.

Mortgagee may proceed against heir or executor, but heir entitled to be reimbursed out of mortgagor's personal estate.

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respect of real assets descended, he might have pleaded assets in the hands of the executor the day of the writ purchased. But the law seems to have been altered in this respect in the time of Edward 4 (i), for per Pigot, 4 E. 4. 25, if a man make an obligation to me, and bind himself, his heirs and executors, and die, I may elect to sue the heir or executor, *at my pleasure*, and Mich. 10 H. 7. 8. b. where, in debt against the heir, he pleaded "assets in the hands of the executor, the day of the writ purchased." Vavisor said, such plea would not be good (k). A similar decision was also made on the like plea in the 3d & 4th of Elizabeth. And no instance has occurred to me in later times, wherein assets in the hands of the executor have been considered as a good plea for an heir in such suit (l); but the debtee has been ever since considered as having an election, where the heir is chargeable to sue him, or the executor or administrator, at law, to recover his specialty debt from the one or the other as he pleases, without regard to the executor or administrator having or being without assets.

Same law acknowledged by subsequent statutes.

The state of Westminster also, which gives the *elegit* (m), subjects the lands and goods indifferently to the execution of the creditor.

And the statute of Acton Burnell (n), and the statute of merchants, in like manner direct that the lands and the goods of the debtor shall be delivered to the merchant by reasonable extent, to hold them until such time as the debt is levied.

[779] The statute staple indeed adopts the old notion (o); charging the lands only in the event of the goods and chattels of the debtor proving deficient.

And the subsequent statute of William & Mary, made to prevent any wrong and injury to creditors by alienation of the

(i) 4 E. 4. 25. 7 E. 4. 13. a. 14 H. 8. 10. b. Poph. 151. Andr. 7, pl. 13. S. C. Benl. 162.

(k) Vide Dyer, 204. b. pl. 2. 1 Andr. 7. [The case to be found by this reference seems to be the same as that reported by Popham and Bendloe.

The name of the case in Dyer, is *Quarles v. Capell*.—Ed.]

(l) 3 Bac. Abr. 25.

(m) 13 Edw. 1. cap. 18.

(n) 11 Edw. 1. 13 Edw. 1. stat. 3.

(o) 27 Edw. 3. stat. 2. cap. 1.

lands descended to the heir (p), or from the ancestor's devising away the lands, makes no provision as to any priority, in pursuing the general assets of the debtor for satisfaction of the debt.

But although the common law, after lands became subject to execution for debt, seems to have relaxed in favor of the creditor, so far as to let him in indifferently on the real or personal fund at his election, it provided no means of adjusting how the burthen should be borne as between the heir or tenant, and the personal representative of the debtor. Here therefore equity stepped in, and, considering the common law remedy against the heir, and the statuteable provisions against the land, as instituted only for the sake of preventing the creditor from a total loss of his debt, and that, therefore, the ancient common law notion furnished the true principle on which an adjustment ought to be made between the heir and executor (q), founded an equity upon the common law notion, and thereupon substituted the heir in the place of the creditor, and fixed the debt ultimately on the personal assets, if sufficient, making the personal, as between the heir and executor, exonerate the real estate (r) (g); in which respect that Court acted in conformity with one of its principles, namely, that in all cases when it is a measuring cast between an executor and an heir at law, the latter in equity shall have the preference.

But though creditor may sue heir or executor, equity has fixed debt ultimately on personal assets, if sufficient (r).

Therefore, although a creditor by specialty may (at law) sue either the heir or executor, and shall have the benefit of

Ergo, executor must exonerate heir if we have assets.

(p) 3 & 4 W. & M. cap. [14. s. 5. Et vide 1 Sel. N. P. 585, 5th ed.—Ed.]

(q) 2 Freem. 304, 205. 208. Hard. 512. 1 Ch. Ca. 74.

(r) *Edwards v. Warwick*, 3 P. Wms. 176.

(F) By recent cases this is explained to mean a sufficiency, after paying the debts, legacies, and every other demand on the personal fund. See ante, vol. I. 343, in the text and notes, and post, 889, the first section of the note there. That the personal estate is the proper and primary fund for the payment of debts and legacies, numerous cases may be adduced. Amongst the late decisions, *Tait v. Northick*, 4 Ves. 816; *Tower v. Rous*, 18 ib. 133; and *Aldrick v. Wallcourt*, 1 Ball & Ben. 312, are the principal.

(G) For the personal estate having received the benefit of the specialty debt or loan, it seemed reasonable that that fund should be primarily liable to exonerate the real estate.

his security against the one or the other at his election; yet, if the heir be charged in debt, where the executor has assets, the former may ultimately compel the latter in equity to pay the debt, unless he can shew some special exemption by the act of his testator, upon which he ought to be discharged.

*Personal estate
primary fund
for payment of
mortgage be-
tween heir and
executor.*

It being then once established, that a mortgage was a specialty debt (s) (H), it followed of course that the personal estate was in the first place to answer it in equity, as between the heir at law of the mortgagor and his personal representatives.

*And whether
heir be hæres
natus, or hæres
factus, it will
be the same.*

But although the principle upon which the heir at law, or *hæres natus*, might compel an executor, in equity, to reimburse him what he had laid out in discharge of a mortgage, or to disencumber the mortgagor in his favor, obviously applied with equal force in favor of an *hæres factus*, or one substituted in lieu of the heir at law where such substitution was lawful; that principle not being founded upon the privilege of the heir at law, but upon the nature of the contract, and therefore equally applicable, whether the land passed to one claiming as heir at law, or as heir by constitution of the owner, yet, in the case of *Cornish v. Mew* (t), which occurred so late as 1677, the Court of Chancery distinguished the case of an heir at law from that of an heir constituted in trust, and refused in the latter case to exonerate the real estate in favor of the trustee (i); and in the case of *Pockley v. Pockley* (u),

(s) *Cope v. Cope*, 2 Salk. 449. S. C. Eq. Ca. Abr. 269. 1 Ch. Ca. 74, 271. 2 Ch. Ca. 5. Ca. temp. Talb. 54. 3 Bro. P. C. 520. 14. Hard. 512. *King v. King*, 3 P. Wms. 358. 1 Vern. 436. Pre. Ch. 455. 3 Ch. Rep. 336. S. L. as to a pledge, the foundation of that contract also being debt, 2 Freem. 272, [and *Phillips v. An-*

nesley, 2 Atk. 58, where the personal estate is called the natural and proper fund for the payment of debts.—Ed.]

(t) 1 Ch. Ca. 271.

(u) 1 Vern. 36. Ch. Ca. 84. Et vide *Lady Middleton v. Middleton*, 2 Freem. 189. *Hawes v. Warner*, ib, 277. *Bishop v. Sharp*, 2 ib. 276.

(H) *Sed quare* if a mortgage can, strictly speaking, be said to be a specialty debt. It will not as such subject the real assets of the mortgagor to its payment, which as a specialty debt it ought to do. See *infra*, 866, 867; and Lord Eldon's observations in *Aldrich v. Cooper*, cited in note there.

*Reference to old
cases on distinc-*

(I) This diversity is to be found in the old cases, viz. that a devisee of particular lands was not allowed to have the personal estate, while an *hæres factus*

which was agitated in 1681, it is said to have been *then* only lately decided, that an *hæres factus*, or heir by substitution of the whole estate, should be allowed the benefit of having the real estate discharged. But in that case, Lord Finch, Chancellor, said, that not only he who was *hæres factus* should pray in aid of the personal estate to discharge the real estate, but even an *ordinary devisee* should have that benefit (κ).

Accordingly, in the case of an ordinary devisee (x), where the defendant's testator having made a mortgage of his lands

General devisee entitled to have

(x) *Johason v. Milksop*, 2 Vern. 112.

of the whole property was permitted to enjoy that advantage. Per Rawlinson. Comm. *Gower v. Mead*, Pr. Ch. 3. Et vide *Howell v. Price*, 1 P. Wms. 291. S. C. Pr. Ch. 447. *Portsmouth v. Suffolk*, 1 Ves. 31. *Robinson v. Gce*, ib. 251. 2 Bro. C. C. 263. 2 Atk. 436. In *Lutkins v. Leigh*, Ca. Temp. Talb. 54. The case of an *hæres factus* was treated as not quite so favorable as that of an heir at law. Lord Talbot's language was this,—“ But here the real estate is devised away, which gives the legatees rather a stronger claim than when they have to do with an heir at law; since it was a long time before a devisee could prevail with this court to have the personal estate applied in exoneration of the real, as appears from many ancient cases, which distinguish in that case between a devisee and an heir at law; though at last he has prevailed where there is no damage done to a third person: but it has been endeavoured here to put him in a better condition than the heir, and to that end, has been cited 1 Salk. 416. There is a great difference between that case and this; for a bond affects not the real estate in the testator's hands; nor did it the devisee, until the statute of fraudulent devises; nor before the statute 3 W. & M. c. 14. did it affect the heir, if he had aliened before the writ brought; but in case of a mortgage, *that* is a lien upon the land, both in the hands of the testator and the devisees, and in whose hand soever the land comes. Thus the court has gone as far as is reasonable, viz. to put the *hæres factus* in as a good a plight as the *hæres natus*; but not in a better.”

tion between hæres factus and hæres natus.

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(K) And this has been followed ever since; per Lord Hardwicke, in *Gallon v. Hancock*, 2 Atk. 436. The words “ordinary devisee” are, it is conceived, to be understood as placed in opposition to “*hæres factus*,” or a general devisee of all the testator's lands. The former words may therefore be considered as embracing a devisee of particular lands; and that the rule will hold in favor of such a devisee, see post, 788. 888, and *Fox v. Fox*, 1 Atk. 463. And it is observable, that the rule throwing the burthen on the personal fund in favor of the heir at law, general or particular devisee, applies whether there is a bond or covenant for payment of the mortgage-money or not. *Tankerville v. Fawcett*, 1 Cox, 239. *Cope v. Cope*, 2 Salk. 449. *King v. King*, 3 P. Wms. 358; and *Meynel v. Howard*, Pr. Ch. 61.

Rule applies to heir, particular and general devisee, whether there be covenant or not.

personal fund applied in payment of mortgage on devised estate (L).

for a considerable sum of money, by his will appointed them to be sold for payment of his mortgage-money, and afterwards devised the lands so in mortgage *as to one moiety* thereof, to the plaintiff, &c. and made the defendant executor, and devised the personal estate to his executor *for the payment of his debts*. The single question was, whether the personal estate should be applied to discharge the mortgage for the benefit of the devisee? And it was decided at the Rolls, that the personal estate should be so applied for the advantage of the devisee, and that decree was confirmed by the Lords Commissioners.

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Same law applies to customs of York.

And since the true ground upon which this equity is founded has been ascertained, and the nature of a mortgage clearly understood, this principle has been admitted in its fullest extent as to mortgages. Thus, in the case of *Pockley v. Pockley (y)*, it was determined, that such debt on mortgage would lessen the widow's customary moiety in the province of York; for the custom cannot take place until after the debts paid.

And London.

So a mortgage shall be paid out of the personal estate, in preference to the customary or orphanage part of the custom of London (z).

and to Welch mortgages.

And although the security be in the nature of a Welch mortgage, in which no certain time is mentioned for redemption, yet the rule has been determined to be the same as to the application of assets; for still the basis of the contract is the debt, [notwithstanding there is neither bond or covenant for

(y) 1 Vern. 36. Et vide S. C. nom. (z) *Ball v. Ball*, cited 2 P. Wms. *Popley v. Popley*, Ch. Ca. 84. 335, n.

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continued. Cases recognising rule in text.

(L) This rule was recognised in *White v. White*, 2 Vern. 43. S. C. post, 785. *Mead v. Hide*, 2 Vern. 120. Pre. Ch. 2, post, 789. *Gainsborough's case*, 2 Freem. 188, 1st resol. S. C. post, 888. *Lovel v. Lancaster*, 2 Vern. 183, post, 790, 1. *Fox v. Fox*, 1 Atk. 463, post, 1044. *Bartholomew v. May*, 1 Atk. 487. *Reeves v. Herne*, 4 Vin. Abr. 457, pl. 12, and by the cases mentioned in p. 780, ante, n. (u). But a devisee of a particular estate, as distinguished from a devisee of the whole real property of the testator, will not be entitled to this benefit, see post, 827.

payment of money], and the land is taken *collaterally* as a pledge (a).

But the equity of the Court of Chancery affords to a person entitled to a real estate by descent or devise, to have the incumbrances upon it discharged as a debt out of the personal estate, goes no further than as between the heir or devisee of the estate and the residuary legatee; it does not interfere with the disposition of other parts, as specific or general legacies, *à fortiori* not with a widow's right to paraphernalia, and much less with the interest of creditors (b) (M).

But it does not interfere with legatee, widow's right to paraphernalia, or creditors.

Although the general rule of equity is to apply the personal estate, in the first place, for the payment of all debts, as well

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Mortgagor may sue against heir or

(a) *Howell v. Price*, Pre. Ch. 477. [S. C. 1 P. Wms. 291. 1 Ves. jun. 406.—Ed.]

(b) 2 Ves. jun. 64, 65.

(M) That the rule for exonerating the real out of the personal estate, does not apply to the disappointment of specific or pecuniary legatees (though it does to the total exclusion of the residuary legatee), see *O'Neal v. Mead*, 1 P. Wms. 693. *Tipping v. Tipping*, ib. 729. *Davis v. Gardiner*, 2 ib. 120. *Rider v. Wager*, ib. 335. *Chaplin v. Chaplin*, 3 ib. 367. and *Bartholomew v. May*, 1 Atk. 487. And that the wife's right to her paraphernalia will remain undisturbed by the application of the rule, *Tipping v. Tipping*, ubi supra; *Puckering v. Puckering*, cited 1 P. Wms. 730; and *Tynt v. Tynt*, 2 P. Wms. 542, in which latter reference, it is said "as to the *bona paraphernalia* of the widow, though there be debts more than the personal estate will extend to pay, yet as these are liable only in favor of creditors, and not of the heir, nor of the devisee, who stands in the place of the heir, and is *heres factus*: if the lands devised be sufficient to pay the recognizance, the *bona paraphernalia* shall be enjoyed by the widow; but if those devised lands should prove insufficient, the *bona paraphernalia* must be subject before the sureties lands shall be extended." Mr. Cox adds, "as against real assets descended, it seems that upon the authority of *Tipping v. Tipping*, the wife shall stand in the place of creditors for the amount of her paraphernalia. See *Snelson v. Corbet*, 3 Atk. 369. *Graham v. Londonderry*, ibid. 393. *Sed quare*, as against real assets devised," citing *Probert v. Clifford*, Easter 1736. S. C. Amb. 6. And this *quare*, it seems, still remains unsettled. See Toller's Ex. 423, 4th edit. But in the case of a real estate charged with payment of debts in aid of the personal estate, the court has decreed that the wife shall retain her paraphernalia in prejudice of the charged estate. *Boynston v. Boynston*, 1 Cox. Rep. 136. S. C. 1 Bro. C. C. 576. For the rule in equity as to marshalling assets, see the end of this chapter, 1st section of note there.

Rule of exoneration between heir and executor works no prejudice to legatee or widow's right to paraphernalia.

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devisee, but not against creditors, exempt personal fund from debts and legacies by throwing them on real estate (n).

specialty debts, which attach upon the land, as simple contract debts, and it is equally certain that a testator cannot, as against his creditors, exempt the personal estate; yet, as against the heir at law, or the devisee of his real estate, he may at pleasure substitute the real in the room of the personal estate, and charge all his debts upon that fund, though not primarily liable. In equity this may be done, either by an instrument indicating such intention in express terms (*bb*), or by an instrument implying a *plain and manifest intention* of the testator to exempt his personal estate, or to give the personal estate as a specific legacy; for he may do this as well as give the bulk of his real estate in that shape.

Points for consideration.

As the consideration of this doctrine naturally arises out of the part of our subject now in discussion, and as, depending merely on questions of intention, it has branched out into a variety of distinctions founded on minute differences and subtle refinements, which have enabled ingenious logicians to discover shades of distinction almost imperceptible to less scrutinizing observers, I shall here call the attention of the reader to this important, and, I may say, curious branch of learning, and endeavour to give a general idea of the criticisms to which it has given rise. In the pursuit of this object, I shall point out what circumstances have been held, not to furnish an inference, that the owner of both funds meant that the personal estate should not exonerate the real estate, and then I shall shew in what cases the personal estate has been exempted (o).

(bb) [Which is by far the preferable mode.—Ed.]

Reference to cases proving point in text.

(N) That the mortgagor cannot exempt his personal estate from payment of debts as against a mortgagee or creditors, see *Bowman v. Reeve*, post, 828. *Hazlewood v. Pope*, 3 P. Wms. 325. *Inchiquin v. French*, Amb. 37. *Stapleton v. Colville*, Ca. Temp. Talb. 208. And that the land cannot be exonerated out of the personal estate so as to disappoint any of the legacies, whether pecuniary or specific, see *Rider v. Wager*, 2 P. Wms. 335. *Cope v. Cope*, 2 Salk. 449. *O'Neal v. Mead*, 1 P. Wms. 693. Post, 861. *Tipping v. Tipping*, 1 P. Wms. 730. *Davis v. Gardiner*, 2 lb. 190. *Bartholomew v. May*, 1 Atk. 487. Post, 827; and *Hamilton v. Worley*, 2 Ves. jun. 65.

Division of chapter.

(O) The consideration of these points exhausts a principal portion of the present chapter. The discussion of the first point occupies from this to p. 800. The investigation of the second point then commences, and being divided into

In the case of *Feltham v. Harlston* (c), it is stated to have been said by Serjeant Fountain, and admitted by the Master of the Rolls, that if a man devise lands for payment of his debts, and make an executor, and leave a personal estate; no part of the personal estate shall go to the payment of debts; because, by making an executor, the testator's intent appears that the executor should have the goods, the testator having made another provision for the payment of his debts; but if a man disposes of lands for the payment of his debts, and after dies intestate, the personal estate shall be chargeable in the hands of the administrator, for no such intent as before appears.

Devise for payment of debts and appointment of executor, evidence of intention to exempt personal fund from its usual burthen.

But the distinction above alluded to has been long since over-ruled; and it has been held, that where the personal estate falls upon the executor *virtute officii*, there the executor shall apply the personal estate in exoneration of the real.

This, long since over-ruled.

This was the case of *Lord and Lady Grey* (d), where the father made a conveyance of an estate to trustees and their heirs to pay his debts and legacies, and subject thereto for performance of his will; and, at the same time, made his will,

Personal estate first applicable to debts and legacies, notwithstanding trust for their payment.

(c) 1 Lev. 203.

120; infra, 789. 826. Et vide *Gray*

(d) *Lord Gray v. Lady Gray*, 1 Ch. Ca. 296. S. L. *Mead v. Hide*, 2 Vern.

v. Minthorpe, 3 Ves. 106. 109; infra, 838.

two heads, the first, as to an express exemption, p. 801, which is again sub-divided into an express exemption by positive words, p. 801, and words implying a negative, p. 802: and, the second, as to an implied exemption of the personal estate, p. 803, (and herein of specific legacies, pages 811, 12) terminates at p. 938. The learned author then proceeds to state (what indeed is more directly applicable to the subject of his treatise than the previous divisions) the principal cases wherein a descended estate has been held to exonerate a devised estate mortgaged, from p. 838 to 861; 2dly. the instances where the personal estate of a purchaser or heir at law, buying or taking an estate subject to a mortgage, shall be exempt from exonerating the land of the mortgage debt, from p. 861 to 872; and, 3dly. the authorities respecting the purchaser's or heir's intention to make the mortgage debt his own, by any and what acts of acknowledgment, from p. 872 to 884. The chapter then concludes with a few remarks on the question, whether parol evidence be admissible to shew which fund the testator really meant to charge with the burthen of his debts and legacies?

and thereby devised that the trustees should pay £000*l.* a-piece to his sons R. and L., and also 6000*l.* to his daughter, the surplus to his heir, and made his wife executrix, but gave her not thereby *in terms* the personal estate; and it was decreed that the personal estate should be accounted for in aid of the heir, as well with regard to what he should be charged for the creditors, as for the legacies.

Personal fund must pay mortgage on real estate, though it leave younger children destitute.

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And it was decreed in *Sir Peter Soame's case* (e), where a father died intestate, leaving a mortgage on his real estate made by himself, that the personal estate should be applied to pay off the mortgage, although the younger children were thereby left destitute (f).

And the rule of equity is equally applicable where there is a *gift* of the personal estate to the executor, if nothing be done to shew that he is meant to take as a *legatee*, and not as executor merely. Thus, where one (f) devised his personal estate to his wife, *whom he made executrix*, Lord Somers decreed that she took it as executrix, and that the personal estate was to be applied in the exoneration of the real estate (g).

(e) 1 P. Wms. 694, cited.

(f) *Cutler v. Corlester*, 2 Vern. 302. 1693.

Personal estate given to next of kin must discharge mortgages, though it be thereby exhausted.

(P) In like manner, if the personal estate be given to the next of kin, and be not expressly exempted from the payment of debts, it must be applied in discharge of the testator's mortgages, although it will thereby exhaust the whole fund. Thus, in *Phillips v. Phillips*, 2 Bro. C. C. 273, the testator having mortgaged his estates, devised the same to the plaintiff for life, with remainders over, and then "gave and bequeathed all the rest and residue of his personal estate to his executors (the defendants) to divide the same amongst his next of kin, share and share alike." The next of kin insisting that this was a specific bequest to them of the residue, and therefore not liable to the mortgage debts, the executors refused to discharge the mortgages without the opinion of the court. The Master of the Rolls said, the rule of the court was settled beyond doubt; he could not look for the construction to the state of the residuary, which was a fluctuating fund, and decreed an account of the personal estate, which he directed should be applied in a course of administration; and the tenant for life to stand in the place of such creditors, to whom interest had been paid by him.

(Q) "For that his Lordship was well satisfied by the words of the will, that the said testator did not intend to exempt his personal estate from the payment of his debts. Reg. Lib. 1693, A. fol. 54, entered *Cutler v. Greening*." Raithby's n. (1).

So, although the bequest to the executor were by way of residue, the personal fund would nevertheless be liable to exonerate the real estate; and, therefore, should one bequeath several specific legacies out of his personal estate(g), and afterwards, in the conclusion of his will, give and devise all the rest and residue of his personal estate to his wife or a stranger, whom he thereby made an *executrix* or *executor*, the personal estate would be first applied towards the payment of specialty debts for the benefit of the heir.

So if bequest be by way of residue.

Thus, where a man devised several legacies, subject to particular charges thereon, and gave the surplus of his personal estate to his wife, the personal estate was directed to be applied in ease of the real (h).

And, on this principle(i), where one devised the surplus of his estate, his debts and legacies being paid, to his wife and his eldest son John, equally to be divided between them, and added, *whom he made his executors*; and farther willed that she should continue his true widow, but, if she married again, his will was, she should render the right of being executrix to his son Roger, to be partner with his brother John in the executorship; the widow of the testator married, and the question was, whether by the marriage she had forfeited her share of the surplus? It was held by Lord Somers, upon the authority of the last-mentioned case, that she had; *for she took as executrix, and not as legatee.*

Provided executor takes such, and not as legatee.

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I should here observe, that the circumstance of the bequest, and the constitution of executor, being in the same sentence, and in favor of the same person, has been sometimes considered as an important feature in these kind of cases; and the cases of *Cutler v. Coxeter*, and of *Barton v. Stone*, have been occasionally resolved upon that principle; and it appears to me, that this circumstance is material as furnishing an index to the then state of mind of the testator; it implies the fact, that

Residuary legatee being constituted executor in same sentence, implies that he is to take as executor.

(g) *Anon.* 2 Vent. 349. *Noke v. Darby*, 3 Bro. P. C. 290. [S. C. 11 Vin. Abr. 243. 2 Eq. Ca. Abr. 500, pl. 39.—Ed.] (h) *White v. White*, 1 Vern. 43. (i) Et vide *Barton v. Stone*, 2 Vern. 308. 1693.

the testator contemplates his legatee as his executor, his executor as his legatee, and that, therefore, as he speaks of them in the same breath in both characters, he shall be taken as viewing both characters indifferently, and as one. But the opposite inference was discussed before Lord Harcourt, in a case which arose upon the will of Lord Chief Justice Hale (k), and disallowed; the circumstances of that case, so far as are material at present, were as follows: Lord Chief Justice Hale, after giving away his study of books to such of his grandchildren as should study the law, and his mathematical instruments to his wife, devised the rest and residue of his personal estate to his wife, and then went on and gave several other directions, touching other things, and, in the close of his will, said, *I do hereby make and ordain my said wife sole executrix of this my last will and testament.* And one question was, whether the express devise to the wife, of all the rest and residue of his personal estate in one part of the will, should be so coupled with the last clause, whereby he made her executrix, as to be all one with the case, where a man devised all the rest and residue of his personal estate to his wife or any other, whom he thereby made executrix; or whether this devise of the rest and residue of his personal estate, being a distinct and independent clause, should be looked upon as a specific legacy to her, and to exempt such residue from being applied in the first place towards payment of the debts, in ease and exoneration of the real estate expressly devised for that purpose, as it would have been if another person had been made executor? Mr. Vernon insisted that it should be exempted; that here he gave her the residue of the estate as a legacy, before he seemed to consider who should be his executors; that the making the executrix was in a distinct clause after, and had no relation to the devise in the will to her before; but Lord Keeper Harcourt inclined that it would be all one. And this seems reasonable, if the principle on which the cases last alluded to stand, be, that since the devise to the executor is perfectly superfluous and idle, and no more than the law would say, were there no such express devise, the executor must take such residue in the same manner as he

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But Lord Harcourt (with good reason) thought it all one, though bequest and appointment were in distinct sentences.

(k) *Hale v. Brooker*, Gilb. Rep. Eq. 73, [mentioned *infra*, 819.—Ed.]

would have done had it been left generally to fall upon him as executor; and, therefore, such executor must take the personal estate after payment of debts and legacies thereout, as the proper and obvious fund for that purpose, and to the payment whereof his office of executor obliges him (R).

There are several ways, by any of which a man may subject his real estate to the payment of both specialty and simple contract debts; as, by conveying his estate to trustees for a term of years or in fee, in order to pay the debts; or by way of charge in equity, which the Court of Chancery will decree to be performed; or he may direct that his real estate may be sold for payment of his debts; but which ever of these modes he adopts, none of them will make the real estate first chargeable; if there be not in the will, either express words, or a manifest intent to discharge the personal estate, it will, nevertheless, be first liable (1): for the same principle on which a court of equity raises an equity in favor of the *hæres natus*, or of the *devisee*, against the personal representative in respect of debts, which, in their original nature, attach upon the real fund, equally pervades the case, notwithstanding such provision be made as to them; for the rule springs out of that great source from whence most of our principles relating to real property are derived, the feudal system, and has for its object the protection of the freeholder; and there is the same reason for raising an equity in his favor, where his estate is rendered liable to the debt by the act of the owner, as where it is rendered liable to the debt by act of law: but another principle interferes, as to simple contract debts so charged; for such will, to that extent, is a disinherison of the heir, which, upon the old maxim of law, cannot be effected but by express words or necessary implication. Besides, in both instances, equity acts in conformity with the general construction it puts

Modes whereby real estate may be subjected to specialty and simple-contract debts; but unless intention to exempt personal estate be very apparent, that fund will in every case be first liable (s).

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(1) Vide *Burton v. Knowlton*, 3 Ves. 107. *Brummel v. Prothero*, lb. 111, [*infra*, 831. 836.—Ed.]

(R) This subject is resumed, post, page 790, *et seq.* to 792.

(S) The general rule is now perfectly established, that in order to exonerate the personal estate, there must be either express words or a plain intention. Per Sir W. Grant, 11 Ves. 186.

upon such provisions; because every provision of this kind takes effect through the medium of a trust either expressed or implied. Now a trust does not affect the rights of parties interested in the thing bound by it, farther than the object in view requires. In whatever mode the estate is charged, subject to the charge, it belongs to the heir. It is his land. He may pay the debts, and call for a conveyance. The same observation applies to the *hæres factus* or devisee. Whether the estate come to the devisee charged with the debts, or be devised to a trustee for a term to secure the debts, or be absolutely given for that purpose, it is, notwithstanding, the estate of the heir or devisee, though subject to the charge. The same policy therefore which raises an equity, where there are specialty debts in favor of the heir, dictates the same equity where simple-contract debts are, by the testator, placed on the same footing as specialty debts.

Charge of debts in equity on particular lands no exoneration of personal fund.

Therefore, notwithstanding the real estate be bound by way of charge in equity, which the Court of Chancery will decree to be performed, yet it shall be exonerated by the personal estate.

Thus, where one by her will said, "I devise to A. B., my heir, Clifton lands (m), he *paying* all debts and legacies charged on these lands, and, after his decease (n), to my nephew B.," and in another part of her will, said, "I leave my jewels, plate, pictures, medals, and furniture, to my two executors, to be equally divided," and in the last clause of her will, said, "Creating St. Mary's, and Creating St. Olive's, I make liable to all debts, notes or bonds, I have contracted since 1735, if any, and what remains to be paid to D., after the Creatings are sold;" Lord Hardwicke held, that the making a particular estate in the land liable to pay debts, did not exonerate the personal estate; because it was the material fund for the payment of debts: and his Lordship was of opinion, that the residue of the personal estate ought in this case to be applied in exoneration of the real.

(m) *Bridgman v. Dove*, 3 Atk. 201,
[et vide post, 821 and 856.—Ed.]

(n) Et vide *Bartholomew v. May*,
1 Atk. 487.

So where D. by will devised several legacies (o), and *inter alia*, 20*l.* to H., and made his executor, and devised his real estate to M., paying his debts and legacies; and devised, that if he did not pay the legacies in three months, and the debts in two months, the legatees and creditors might enter and hold till satisfied (τ). It was decreed, on a question whether the personal estate should be applied in case of the real estate, that it should; for that the devise amounted but to a charge upon the real estate, and intended not to avoid the estate in case of non-payment.

Devise to M. he paying debts and legacies, personal estate must be first applied.

Again, if lands be devised for the payment of debts and legacies (p), and the residue of the personal estate be given to executors after the debts and legacies paid; the personal estate shall, notwithstanding, as far as it will go, be applied to the payment of the debts, &c. and the land charged no further than is necessary to make up the residue.

And land charged with deficiency only.

So, where a man devises his estate to his trustees to be sold for payment of his debts, the personal estate shall nevertheless exonerate it as against a residuary legatee; for the residue implies, *after debts and legacies paid*.

No residue till debts and legacies paid.

Thus, where a man devised all his freehold houses, lands, and hereditaments (q), in W., to three trustees, to hold to them in trust, that the freehold estate should be subject to,

Devise to trustees to sell and pay debts, residue to A. Personal estate first applicable, there being no words to exempt it (v).

(o) *Mead v. Hide*, 2 Vern. 120.

(q) *Fereges v. Robinson*, Bunb. 301.

[S. C. post, 826, nom. *Gower v. Mead*. —Ed.]

Lovel v. Lancaster, 2 Vern. 183. [S. C. post, 790.—Ed.]

(p) *Anon.* 2 Ventr. 349.

(T) The words of the devise were, that the said testator “ did give and bequeath unto the said Elizabeth Mead (the plaintiff) all his lands, tenements, messuages, houses, and bullaries of salt water, whatsoever and wheresoever, to hold to her, her heirs and assigns for ever, upon condition she paid all his debts owing, and legacies bequeathed in his will.” Reg. Lib. 1689. B. fol. 380.

Words of devise.

(U) In like manner in *Hancox v. Abbey*, 11 Ves. 186, the Master of the Rolls declared that a devise to sell for payment of all debts should not exonerate the personal estate; for that shewed nothing more to be intended than that all the debts should be paid, and that the real estate, if it were necessary, should be applied as an additional or auxiliary fund.

Reason for not exempting personally, where there is a devise for debts.

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and be sold and disposed of by them for payment of his just debts; and, after disposing of some particular legacies, gave to his nephew the rest and residue of his goods, chattels, debts, rights, credits, and personal estate, not before disposed of; the question was, whether the personal estate should be first applied to the payment of the debts, notwithstanding the real estate was expressly devised for that purpose? It was insisted, on behalf of the *residuary legatee* (r), that the real estate being not only made subject, but directed to be sold for the payment of the debts, the personal estate should not be applied for that purpose. But it was held *per totam curiam*, that here being no negative words to exclude the personal estate from being applied for the payment of debts, it ought to be first applied for the benefit of the heir at law. And it was decreed accordingly.

Personal estate must pay debts and legacies, though term of real estate be by deed created expressly for their payment (x).

And the rule of law is the same, if a term be created expressly for payment of debts. The personal estate shall be applied in ease of the real.

Thus, where one, after several particular legacies, devised all his goods and chattels to A. B. and C., *to their own disposition*, and made them executors (s); and by indenture of the same date, demised several manors and lands to A. and C., for 500 years, in trust for himself for life, and after his death upon trust, out of the rents and profits to pay his debts, legacies, and funeral expences, and four years afterwards to attend the inheritance; on a bill exhibited by the heir at law of the testator, to have an account of the personal estate, and of the

(r) *Quære*, whether the legatee was executor? [This *quære* is made in reference to the cases cited, post, 869.—*Ed.*]

(s) *Cook v. Gwavas*, 9 Mod. 187.

[*Gray v. Gray*, 1 Ch. Ca. 296, ante, 784; and *French v. Chichester*, 2 Vern. 568, post, 792, are also instances of trusts of the inheritance created during life.—*Ed.*]

(X) See *Powis v. Corbett*, post, 856, and distinguish this case from that. See also *Read v. Lichfield*, post, 821, *in notis*, for a contrast between the above case and a devise for payment of debts by means of a term, where there is an evident intention to throw the burthen entirely on the real estate.

rents and profits of the real estate, and that the personal estate might be applied to pay debts and legacies, in case of the real; it was insisted by the executors, that they were entitled to the personal estate as a legacy; but it was decreed that the personal estate should be applied in exoneration of the real.

So, if the provision be made in the shape of an express trust of the inheritance, the rule will still be the same.

Thus, in the case of *Lovel v. Lancaster* (t), where T. S. devised land to A. B., for payment of debts, and devised to T. D. certain lands, which the testator in his life-time had mortgaged, and likewise gave him his personal estate; the question was, whether T. D. should have the benefit of the trust for payment of debts, so as to have the money owing on the mortgage paid off by money raised out of the trust, that the land might come to him clear of the debt owing to the mortgagee; and it was held, that he must take the mortgaged land, *cum onere*; and that the personal estate also, though devised to him, must nevertheless be subject to the debts, notwithstanding lands were devised for the payment of them (y).

Devise of one estate for payment of debts—of another, to B. subject to a mortgage, and bequest of personally also to B. he takes estate cum onere, and must pay debts.

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The circumstance of the personal estate being given to a person, and that person being named executor in the same

Resumption of subject discontinued in page 787.

(t) 2 Vern. 183. Vide [S. C. semb.] Pre. Ch. 3. 2 P. Wms. 335. 190.

(Y) Mr. Raithby's note to this case, supported by Reg. Lib. is material. It is in these words:—"There does not appear to be any direct devise of lands for payment of debts. The testator in his life-time conveyed to certain persons by indentures of lease and release the premises therein mentioned, upon trust that they should sell and dispose thereof, for and towards payment of his debts, to such person or persons, and in such manner as he, his executors, or administrators, should direct or appoint; but no appointment by the will appears so far as the same is stated in the Register's Book: the decree directs, that in case the personal estate should not be sufficient for payment of the debts, then the trust estate to come in aid and be applied to pay what the personal estate shall fall short to pay." Reg. Lib. 1690. B. fol. 166. Considering then the mortgage as a debt, it should seem to follow, that if the personal estate were insufficient to discharge all the debts, reckoning the mortgage as one, T. D. might well call on the conveyed estates for payment of the deficiency; and consequently he would take the estate devised to him *cum onere*, only in case the personal estate were insufficient to discharge all the debts and the mortgage likewise.

Case in text explained and qualified.

sentence in which such bequest is made, has been considered; as well in cases where a provision is made for payment of debts by charge, &c. on the real estate, as in cases where specialty debts are indifferently chargeable on both funds, as furnishing evidence, that such person is intended to take the personal estate in his official character, and not as legatee; for it has before been observed (z), it is to be presumed, that the testator, speaking of the whole in the same breath, has but one design, *viz.* to give the personal estate to him as executor, who, in the same moment that he gives him his estate, he constitutes executor.

Gift of personal estate to A. (who is appointed executrix) and of real estate to B. charged with debts, personal estate first liable.

The case of *Broomhall v. Wilbraham* (u), furnishes an instance of this kind. There a testator devised in the following words, *viz.*: "all my personal estate, of what nature, kind, or quality soever, I give to my sister A., whom I make my executrix; and all my real estate, of what kind, nature, or quality soever, I give unto my sons B. and C., *chargeable with my debts*;" and it was held at the Rolls, that the personal estate should be first liable, and that decree was afterwards affirmed (A).

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(u) Cited Ca. temp. Talb. 204.

(Z) See ante, page 786.

Devise to pay debts no exemption of personally given to wife executrix. Sed quare if personally had been given to her own use.

(A) So in *Lucy v. Bromley*, Fitzg. 41, where J. S. by will settled his land for payment of his debts, and made M. his wife executrix, and devised all his personal estate to her; and, by subsequent clauses, gave several specific and pecuniary legacies to her, and died; it was adjudged that M. took the personal estate, not as legatee but as executrix; and so the same after the legacies paid, was held applicable to discharge the real estate in favor of the heir. Bunbury's report of this case is as follows:—A. by will charged his real estate with payment of his debts, funeral, and legacies, and gave to M. his wife 1000*l.*, payable in two years after his death, with interest; and his house in R. with the use of the goods therein, for life, and the use of his plate and goods at C. during her widowhood; and, after other legacies, testator concluded his will, and made his wife sole executrix of his will, and of all his goods, chattels, and arrears of rent, not before given or limited in his will. *Per curiam*, the personal estate in the hands of M. ought to be applied to pay his debts, in ease of the real estate. Note [by the reporter], it was insisted, that making M. executrix of particulars amounted to no more than making her executrix in general. But *per Pengelly*, C. B. if the words *to her own use* had been added, or such like words, it might have given some cause of doubt.

And this circumstance, of the bequest of the personal estate, being in the same clause in which the legatee was named executrix, was considered, in the case of *French v. Chichester*, as it is reported in Vernon (x), as demonstrative, that the legatee was meant to take as executrix; and that, although the legacy was in favor of a wife, and the testator expressly declared in his will, that the same was given her as a compensation for her own inheritance, with which her husband had prevailed upon her to part (B).

Appointment of executor, being a continuation of clause giving him personal estate, evidence that he was intended to take as executor, if no words added that bequest was to be free from debts.

This case came on upon a bill of review. The error assigned and relied on was, that *John Chichester* (y), as heir and executor to his father, having raised sufficient out of the real and personal estate for payment of his sister's portions, devised to them by his father's will, and having paid all but one sister, who was under age, did by deed convey several lands to trustees for payment of his debts; and afterwards made his will, and thereby also directed that his trustees should, out of his trust estate, pay his debts, legacies, and funeral, and thereby devised to his wife, "*whom he made his executrix* (x)," all his personal estate not otherwise disposed of (c), intending thereby a provision for her, *she having been prevailed upon to sell away part of her own inheritance*. And the question was, between the heir and executor, whether the wife and executrix should have the personal estate as devised to her, and leave the debts charged upon the land; or whether the personal estate should be applied in ease and exoneration of the real estate? On the part of the wife, it was insisted, that the testator having charged his debts upon his land, and

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(x) 2 Vern. 568.

affirmed in Dom. Proc. 1 Bro. P. C.

(y) *French v. Chichester*, 2 Vern.

192.—Ed.]

568. [Vide the authority of this case questioned by Lord Talbot, Ca. temp. Talb. 209. et infra, 793, but it was

(z) Note. This I take to have been the language of the will. Vide *Cutler v. Coxeter*, and *Barton v. Stone*, ante, 784, 5.

(B) But Lord Harcourt inclined to think that it would be immaterial whether the bequest of the personalty and the appointment of executors were in the same or distinct clauses, and the learned author appears to acquiesce in that opinion, see ante, page 787.

(C) See an important distinction on these words, post, 804.

afterwards by his will having charged even his legacies and funeral expences upon his land, and devised his personal estate to his wife, did sufficiently manifest his intention, that his wife should have his personal estate as a provision for her, and to her own use; and that the same was but a small recompence for what she had parted with; but if made liable to debts, *the whole would be exhausted*, and the provision intended for the wife defeated; and that the known rule was, that where the personal estate was devised away, the heir should not have it applied in exoneration of the real; but the Lord Keeper Wright upon the former hearing, and the then Lord Keeper Cowper on the bill of review, were both of opinion, that the *dévisé* being in the *same clause* in which *she was named executrix (a)*, and not said free and exempt from payment of debts, she must therefore take it as executrix, and the same must be applied for payment of debts; and the demurrer was allowed, and the bill of review dismissed.

Lord Talbot's
reasons for
doubting au-
thority of pre-
ceding case.

But Lord Talbot, in the case of *Stapleton v. Colville (b)*, although he admitted that the circumstance of the personal estate being bequeathed, and the legatee being named executor in the same clause, had been considered of great weight in such cases, and had in some instances been decisive, as furnishing an inference, that the executor was to take as executor and not as legatee, and consequently subject to the exoneration of the real estate; yet doubted the authority of *French v. Chichester*, if that circumstance was the only one on which it was grounded: for his Lordship thought that there was a plain difference, as between the case of making a man executor, and the making him likewise a legatee of the personal estate; because, if the executor died in the first instance intestate, before probate, the representative of the testator was entitled to the administration; whereas, in the latter instance, there being an express gift to him, he took as legatee;

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(a) Note, in *Banfield v. Wyndham*, infra, 805, the wife was made executrix in the same clause that bequeathed to her all this personal estate, yet it was held, that she took the personal estate exempt from the burthen of the

debts. See these cases distinguished in p. 804, infra. [This, it is conceived, is the meaning of the author's concise note here in the 4th edition of his treatise.—Ed.]

(b) Vide infra, 819.

and consequently upon his death his representative would be entitled to it, and interest being vested in him in his own right, in the one case, but nothing at all in the other, until he had converted it.

And Lord Talbot, in the before-mentioned case of *Stapleton v. Colville*, observed further, that, in the case of *Broomhall v. Wilbraham* (c), it appeared, that, had the real estate which was devised to the sons been charged with the debt, they would have had nothing, and the testator's sisters, who were the devisees of the personal estate, would have ran away with the whole; and that the question being between the testator's own children and his sisters, it was natural and just to construe the intent in favor of the children, and to lay the load on the personal estate.

His suggestion of better ground for Broomhall v. Wilbraham than that in pages 791, 2.

However, I am inclined to think, that the decree in *Broomhall v. Wilbraham* might, upon the authority of the cases of *Cutler v. Coxeter* and *Barton v. Stone* (d), be supported upon the circumstance of the bequest being comprised in the same sentence in which the legatee was made executrix, without having recourse to the equitable ground taken by his Lordship; because there appears to me no reason to distinguish this case from those to which I have alluded, unless upon the ground, that in the case of *Broomhall v. Wilbraham* the debts were provided for by a charge on the real estate; but that seems to be no ground for exempting the personal estate, that circumstance alone being considered only as enlarging the fund, and not as affecting the equity, as between the heir and the executor. And it seems to me, that the case of *French v. Chichester* is distinguishable from the cases of *Cutler v. Coxeter*, *Barton v. Stone*, and *Broomhall v. Wilbraham*, on the ground that the personal estate being given as a provision for the wife, and in respect of her having been induced to part with her own inheritance, *rebutted any equity* that might have arisen in favor of the heir, had those circumstances been out of the case *.

Author's reasons for not supporting cases invalidated by Lord Talbot.

(c) Ante, 791, 2.

(d) Ante, 784, 5.

* For the residue of this page of the 4th edition, beyond the next paragraph, see post, p. 799.

Estate to be sold out and out for payment of debts.—Personal estate not otherwise disposed of than by appointment of executor, first liable.

And though an estate be devised to be sold out and out for payment of debts and funeral expences, with a particular disposition of the surplus money; yet if the personal estate be not otherwise disposed of than by the appointment of an executor, the personal estate will be liable to exonerate the devised estate: and the devisees of the surplus will be entitled to call upon the executor in equity to reimburse them out of the personal estate, so much of the fund arising by sale of the real estate, as has been paid in discharge of debts and funeral expences, in exoneration of the personal estate (e) (D).

* And the mere circumstance (k), that both funds are given to the same persons, furnishes great room for presuming,

(e) Vide *Gray v. Minithorpe*, 3 Ves. 2 Vern. 740. [S. C. Gilb. Eq. Rep. 103. [S. C. ante, 784.—Ed.] 128. 1 Dick. 26. 6 Bro. P. C. 291,

(k) *Dolman v. Smith*, Pre. Ch. 456. Toml. edit. on other points.—Ed.]

* The former part of this page of the 4th edition, may be found post, p. 803. The arrangement and subdivision of the text require this alteration. It is evident that the contents of pages 846, 847, 848, 849, 850, and 851, are entirely misplaced, if introduced (as in the 4th edition) under the second division of the subject, which commences at p. 803, post.

Lord Loughborough's judgment in Gray v. Minithorpe.

(D) Lord Loughborough's judgment was in these words:—"The court is bound to give effect to all the will. It is very clear the testator meant by the sale of the real estate to provide a fund for his debts. It is equally clear he supposed there might be a residue, of which he disposed, and then after answering all these payments, he supposes there will be still a residue, and gives that to another person. Then, as to the personal estate, there is no mention of it in the will except the mere nomination of an executor. No case comes up to this; that the mere nomination of an executor, though under circumstances that would give to him beneficially the personal estate, and not make it distributable to the next of kin, shall have the same effect as a distinct specific gift of it to an individual, as there was in *Bamfield v. Windham*, Pre. Ch. 101, and *Wainwright v. Bedloe*, ib. 451. S. C. 2 Vern. 718. And it would be a strong conclusion when the effect would be to defeat those gifts the testator had clearly intended to make, if there should be a fund out of the produce of the sale of the real estate. They are not strictly legacies, but they are certainly in the nature of legacies; and the defendant's construction would in effect give to a person only nominated executor a right to all the personal estate, in opposition to the persons who are entitled to those sums by the will. Therefore I have no difficulty in holding, that the personal estate not particularly given to any one, but merely attached to the person of the executor, shall be liable in the first place. The costs must come out of the fund, and the residue, after paying the costs and the several sums of 50l. [which were directed by the testator to be paid out of the surplus,] must be paid over to the nephew J. Gray."

that the personal estate is not intended to be exempted from exonerating the real estate (E).

Thus, where A., by will, devised his household goods and furniture to B.; and 1000*l.* to C., payable at twenty-five, and likewise 500*l.* to D. payable at twenty-five, and devised all his manor, lands, tenements, and hereditaments, to trustees and their heirs, in trust for the payment of his debts, legacies, and funeral, and then by his will expressly charged them with the payment thereof, and directed that his trustees should reserve the rents and profits of his estates till B. should attain his age of twenty-five years, and thereout allow him 25*l.* a-year; and 20*l.* a-piece to C. and D., until they should attain their ages of twenty-five years; and devised the residue of the rents and profits of the said estate, together with the same estate to B. in tail male, remainder to C. and D. in tail male successively, remainder in like manner to three other

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Devise of real estate to trustee (charged with debts) till B. is twenty-five, then to B. in tail, with a small annuity to him in the mean time. Bequest of personality to H., latter found not exonerated.

(E) When both funds are given to the same individual, it can be an object of little consequence which fund is to be first applied in payment of the debts, except perhaps in the instance alluded to by Lord Talbot, post, 797, 8, for what is disbursed with one hand must eventually be replaced by the other. See *Hale v. Cox*, 3 Bro. C. C. 322. 11 Ves. 187, and post, 829. And it is submitted, that this deduction of the learned author is not substantiated by the case cited for its support, except indeed by Vernon's report, which is very loose and unsatisfactory. The case turned entirely on another point; and not on the arbitrary and unreasonable ground suggested in the text. The decree was founded on an argument drawn from the frugal disposition of the testator, apparent throughout the whole will, whereby he restrained his heir at law (who was to take the personal estate) to a very trifling annuity out of his real property also devised to him, until he should have attained his age of twenty-five years, and then it was said, the testator could never have meant to thus closely restrict his nearest relation as to one fund, and allow him the full latitude of the other. This argument was sufficient to support the decree, without resorting to the technical distinction in the text. The learned author further cites the case of *Hazlewood v. Pope*, post, 797, where some reliance appears to have been placed on the circumstance of both funds being given to the same person. But Lord Talbot, in a subsequent case, has himself announced that his determination in *Hazlewood v. Pope* was not founded on this single circumstance, but upon the contemplation of the whole will taken together, see post, 798. It is therefore conceived, that the proposition in the text is redundant and untenable; and this may be submitted without impugning the decision in *Dolman v. Smith* and *Hazlewood v. Pope*; for those cases, it is presumed, are referrible to other principles infinitely better able to sustain them.

Doctrine in text considered untenable.

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persons, with remainder to the right heirs of one of them, who was a stranger, and no relation to the family; and then devised several things to go along with the estate as heir-looms; and afterwards devised all the rest and residue of his goods, chattels, and personal estate before unbequeathed to B., and made the trustees his executors, and died. The question was, whether the personal estate belonged to B., exempt from debts, legacies, and funeral expences, or whether it should be applied in the first place towards satisfaction thereof, notwithstanding the express charge on the real estate for payment (F)? And Lord Cowper, on the whole frame of the will, was of opinion, that the personal estate was to be applied in the first place, in case of the real estate: First, because there was no express clause to exempt the personal estate, which had always been a distinction taken in the Court of Chancery. Secondly, because it appeared that the heir of this family was not to have the real estate till his age of twenty-five years; nay, not so much as the rents and profits which should actually fall and become due, before that age; that the testator appeared throughout to carry a very frugal intention, and therefore would allow his heir no more than 25*l.* a-year for his maintenance, and that too carried beyond the usual time of his age of twenty-one years; for he was to be trusted with nothing more, even till his age of twenty-five years. Could it then be thought that he intended indefinitely to trust him with the personal estate, without limitation to any age, so that he might squander it all away, and waste it as soon as ever he came to it? that both the real and personal estate were in

*Correction
of text.*

(F) In the 4th edition, the statement of this case is much confused by the promiscuous intermixture of the letters B., C., D., and one E. a stranger. The facts, too, are incompletely developed; and the question, as above propounded, does not embrace the actual point in dispute. By Vernon's report it appears that B. died an infant, and that the question was, whether the residue of the personal estate, not particularly devised by the testator, should go to the administrator and representative of B., exempt from the payment of the said testator's debts and legacies; or whether the personal estate, not particularly devised, should be applied to pay those debts and legacies in exoneration of the real estate? And it was contended, that if such residue of the personal estate were applied in exoneration of the real estate, that then it would be wholly exhausted, and the devise of it to B. become idle and vain. See 2 Vern. 740. The judgment then proceeded as above.

this case to come into the same hand, and, therefore, he could have no such frugal intention with regard to the one, and leave it so loose with regard to the other. And his Lordship decreed the personal estate to be subject, in the first place, to the debts and legacies.

So (l), where one devised all his lands, tenements, and hereditaments, in the counties of W. and M. to trustees, in trust by rents and profits, sale or mortgage, to raise so much money as would pay his debts, and interest for the same; and, after payment of his debts, that they should stand seised of such part of his estates as should remain unsold to and for such person and persons as should be entitled to his settled estate; and if any money remained after payment of the debts, the same should be paid to his daughter, or such other person as should be entitled to the said other estates, and he gave all his personal estate to his said daughter, and made her sole executrix: Lord Talbot decreed the personal estate to be applied in the first place to the payment of debts. His Lordship chiefly grounded his opinion upon the circumstance, that the same person was the devisee of the personal, and also devisee of the surplus of the real estate in tail; for he could not think it was the intention of the testator to exempt his personal estate from his debts, for no other reason, but that his daughter might dispose thereof by her will, under her age of twenty-one, on purpose to leave the real estate of the testator, and which was settled on herself in tail, the more incumbered.

Devise to trustees to pay debts, and residue to daughter, to whom personal estate is given, and she is made executrix. Personal estate first liable.

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So, in the case of *Harewood v. Child* (m), where the words *Same case.* were, "I devise all my manors to A. and B., and their heirs "in trust, that they and their heirs, out of the rents and profits, or by lease or mortgage, or sale thereof, or any part thereof, shall raise so much money, as I shall owe at my death; and after payment of my debts, and reimbursing themselves upon farther trust, that they and their heirs shall

(l) *Hazlewood v. Pope*, 3 P. Wms. 323. [S. C. For. 204.—Ed.] Et vide *Dolman v. Smith*, Pre. Ch. 456. 2 Vern. 740; ante, 795.

(m) Cited Ca. temp. Talb. 204, [corrected from Reg. Lib. 1 Cox, 7.—Ed.] This seems to be the same case as that last cited.

“ stand seised of such part of the premises as shall remain unsold, to and for such persons and uses as the manor of C. is already settled, and if any money remains after payment of my debts, it shall be paid to my daughter, and such as are entitled to the said manor, by the limitations aforesaid.” He had already given the manor of C. to his daughter in tail, with remainder to his nephew, and then he gave all personal estate, of what nature or quality soever, to his daughter, whom he made executrix, and it was held, that notwithstanding this express devise to the trustees, the personal estate should be first applied in discharge of the real.

Last case decided not on any particular ground, but on view of whole will.

Lord Talbot himself states the ground on which he determined this case, in that of *Stapleton v. Colville* (n). He says, the opinion of the court was founded upon the contemplation of the will, which being taken together, manifested the intent to be, that the daughter should take the personal estate, liable to the payment of his debts, she herself being devisee of the whole; and it would have been absurd to imagine, that the testator meant his personal estate to be exempt from the payment of his debts, when he had expressly provided, that the surplus of the produce of what should be raised out of the real estate, should go to the same person, who was devisee in tail of the real estate* (g).

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(n) Ca. temp. Talb. 208, post, 819.

* The residue of this page of the 4th edition, may be found post, p. 803.

That debts may be more easily paid devise to trustees to sell, &c. remainder to A. for life, remainder over. Bequest of residue of personalty to A. no exoneration of natural fund.

(G) It may here be in order to notice the case of *Samwell v. Wake*, 1 Bro. C. C. 144, which appears to have been determined on the principle of the preceding case, and not noticed by the author. The will in that case was couched in this language:—“ I desire that my debts and legacies shall be paid, and for that purpose, I charge all my estates with the same, and that it may be more easily done, I direct, that Sir W. W. and J. H. (the defendants) and their heirs, shall sell the estate, and apply the money in payment of my debts and legacies, and that it may be lawful for them to pay the same out of the rents and profits or to raise the money by mortgage.” And subject to the debts and legacies, the testator devised the said premises to the plaintiff (his natural son) for life, with remainders over: he then gave several pecuniary legacies, and gave the residue to the plaintiff. The plaintiff filed this bill to compel the trustees to pay the debts and legacies out of the real estate, insisting, that he took the personal estate exonerated of them. For him, it was con-

* The principle upon which courts of equity proceed in all these cases is, that the testator's intent must govern the construction of his will. The barely charging a man's real estate with his debts, or conveying them to trustees in trust to pay his debts, does not evince a design to exempt the personal estate primarily charged therewith, or at least it is not in point of law conclusive evidence to that extent, because the personal estate is positively liable in equity, independant of the will; it therefore requires negative words in the will, or something tantamount to rebut this conclusion of law, and exempt the personal estate; but the merely rendering another fund liable, implies no such intent; for, *prima facie*, it imports nothing more than the testator's intent to render his real estate liable as an accumulative fund, in case of any deficiency in the fund primarily liable; nor does the gift of the personal estate to one constituted executor in the same breath, amend the case; because in doing that, the testator only makes a positive disposition of the property there, where the law would have thrown it, had nothing been said; it is therefore only *expressio ejus quod tacite inest*. The two circumstances, taken together, cannot furnish any inference beyond that, which the strongest circumstance viewed distinctly would reach, and neither circumstance taken separately is sufficient to rebut the equity in favor of the heir.

Charging real estate with debts, no proof in equity of intention to exempt personal fund,—to do which negative words are requisite.

* For the former part of this page of the 4th edition, see ante, p. 794, 5.

tended, that from the frame of the devise, the testator seemed sedulous to throw the burthen of the debts and legacies upon the real estate, and to exempt the personal fund; but the court, stopping the counsel for the defendants, observed, "It is very clear, there is not enough here to exonerate the personal estate. The personal estate is the proper fund,—in order to exempt it the testator must express his intent. It is not sufficient to charge the real, but he must shew that his purpose is, that the personal should not be applied. The words to be attended to are those relative to the personal estate. [S. P. 1 Meriv. 220.]—He gives pecuniary legacies, and then by a very loose clause gives the residue to the plaintiff. The court is then called upon to construe the most large and loose residuary clause that ever was seen, in such a way as to change the natural order of payment. Where the intent has been strongly expressed, and it has been for near relations, old cases have carried the matter further than good sense, without precedents, would have done, but none of the cases apply to the present. Therefore, the personal estate must be first applied to the payment of the debts and legacies."

Discharge of personal estate to be attended to only.

Whatever executor takes as such liable to debts.

And wherever an executor takes a sum of money, *qua* executor, whether such a sum be payable out of a personal or real estate, it will be liable to exonerate his testator's real estate from debts.

Devise to C. "he paying 100l. to executor." The 100l. liable to debts (H).

Thus (*f*), where one devised 100*l.* and all his books to A. and B., whom he afterwards made his executors, and gave a copyhold estate to C., he causing to be paid to his executors the sum of 100*l.*; and, *after payment of debts and legacies*, gave the residue and remainder of all his estate, freehold, copyhold, leasehold, plate, rings, stock, &c. to the Governors of the Foundling Hospital, and their successors for ever; one question was, whether this 100*l.* should be subject to the testator's debt? *Et per* Lord Hardwicke, Chancellor, the first question is, in what capacity the executors take? For if they take in the capacity of executors, the money must go for the purposes in the will. And I am of opinion they take as executors; any other determination would break in on an established rule, and make a precedent of bad consequence, by saying, that when they take barely by the name of executors, they shall take for their own use. In every case where real estate, or a sum of money out of it, is given by the name of executors, it shall be considered as given in that light, and for the purposes of the will, and this is consonant with other cases applicable to the office of executor, which are as strong as the present. For instance, the lands of a villain are assets, so was the villain himself; therefore what comes as accruer from him must be assets. Though the executors had died before the testator, it would have been a good bequest of this 100*l.* charged on this copyhold for the purposes of the will, so far as it could take effect, that is, for debts and legacies; and if one of them should die, it would survive to the other, and there is no determination to the contrary. It must therefore be considered subject to that duty which is upon them by their office; and it is material, that when he speaks of them

(*f*) *Arnold v. Chapman*, 1 Ves. 108.

(H) For the late cases on this division of the chapter, see the note to p. 836, post, section I.

with relation to their office, he calls them executors; where he gives to themselves, he calls them by their own names.

But, as we have observed, if there be express words, or a plain necessary implication arising from the words of the testator, or deducible from the manner in which he disposes of his property, of his intention to exempt his personal estate from his debts, and to substitute the real in the room of the personal estate, *this he may do, and the law will support him in it.*

Personal estate may be exempted from debts by express words, or obvious implication.

First, it may be done by express words, which may be either positive, or impling a negative.

By express words,

By positive words (*g*), as if a man devise lands to be sold for the payment of debts and legacies, and *will that his personal estate shall not stand or be charged or liable thereto*; or if the devise for sale of lands for the payment of debts be general, and the testator afterwards devises all the rest and residue of his personal estate, *having already made provision* for the payment of his debts and legacies out of his real estate, or out of such particular lands, or such like clauses; in these cases the real estate, so subjected, shall not be exonerated by the personal.

Positively exonerating personal fund.

Thus, where Sir William Leman (*h*), possessed of a real and personal estate, the former incumbered by several mortgages of his ancestors, made his will, in which was inserted this particular clause: "I desire all my debts may be discharged by my executors, I mean those only of my own contracting, not those heavier debts charged by my family;" and, after giving several legacies, gave his personal estate to his mother, whom he made executrix, desiring her to pay all his just debts exactly; the mother, after the making the will, bought in the mortgages, which were assigned to her, and for the payment of which the son entered into a covenant. He died in 1741, there having been no payment or demand of principal or in-

Testator desires his executors to pay debts, adding "I mean those only of my own contracting, not those heavier debts, charged by my family." This exempts personal estate from heavier debts.

(*g*) Per Lord Harcourt, Keeper, Gilb. Eq. Ca. 73, 74.

(*h*) *Leman v. Newnham*, 1 Ves. 51.

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terest for twenty years (1). In 1744 the mother brought a bill against the present plaintiff and defendant L. and N., who were the co-heirs at law of her son, for payment of the mortgages, or else to foreclose. Afterwards, she dying, made L. one of the co-heirs, her executor, who got his name struck out of the original, and now brought a bill of revivor against the other co-heir for a sale of the mortgaged estate; and that, out of the money arising thereby, the principal and interest due should be paid by N. the defendant: the plaintiff claiming by a double right, as executor of the mother, who stood in the place of the mortgagee, and as co-heir of her son; one question was, out of what fund these mortgages were to be paid? And it was held by Sir-William Fortescue, Master of the Rolls, that the will, by which it was agreed that he had a power to charge his real or personal estate with these mortgages, was the proper rule to go by, as far as it directed; so that the question was, whether, and how far, it had done so? It had been insisted, that the personal estate, being the proper fund, could not be discharged without particular words; and that, therefore, though there was a direction for payment of the debts out of the real estate, that would not change the fund, but would only make good any deficiency of the personal estate. That was the general rule; but here there were express words of exemption. It had been said, that, though there was this exemption in the first clause, it was not in the latter, where the testator directed all his just debts to be paid exactly. In answer to which the court said, it was a constant rule, that one part of a will was not to be construed contradictory to another, if both would stand; and, when the testator had so particularly explained what he meant by his debts, it would be hard to give it a different construction (κ).

Will to be construed so as one part do not contradict another.

Debts contracted after date of will must be paid (as well interest as principal) out of fund charged therewith.

(1) As to this point, see ante, vol. i. p. 392, *in nota*.

(κ) The report continues, "It is further objected that the mother's buying in those mortgages, and the son's covenanting for the payment of them was after making the will, whereby he made them his own debts, and they no longer came within the description of his heavier family debts. But the will must be made to speak from the testator's death, and be looked upon, not not only as his last will, but last words: so that where a will charges a real or personal estate with debts, any debts contracted after are equally liable to be paid. Wherefore, though by the covenant he makes himself liable to her re-

By words implying a negative (i). As where M., seised in fee of lands, devised them to his wife for eighty years, if she should so long 'live, and afterwards to trustees for ninety-nine years in trust, that by the perception of the profits, or by the sale of the said estate, they might pay his debts with remainders over; and devised to his wife all his plantations in Nevis, and his negroes, servants, goods, stock, and all his *personal estate whatsoever to her own use, having charged his real estates for the payment of his debts, that his personal estate might come clear to her, and made her sole executrix and died: a bill in Chancery was exhibited by the wife, to enforce the trustees to sell the lands, or so much thereof as would be sufficient to raise money for the payment of the debts; or that, if she should be compelled to pay them out of the personal estate, then that the lands might be conveyed to her to reimburse her. It was contended, that the personal estate ought in the first place to stand charged, and not the real, until the personal should prove deficient. But the court decreed the trustees to execute the trusts by sale of the lands appointed to be sold to pay the testator's debts.*

Charge of real estate with debts, so that personality may go clear to legatee, an exemption of personal fund.

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* Secondly, from the general frame and tenor of the will, as displaying a manifest intention of the testator to exempt his personal estate. *Exemption by manifest implication.*

† Thus, if the *whole* personal estate be given, in some sort, as a specific bequest, and there be a provision for the payment of debts out of the real estate, and the consequence of charg- *General rule.*

(i) *Lady Anne March v. Fowke*, Finche's Rep. 414.

* For the residue of this page of the 4th edition, see ante, pages 795 and 796; and for the intervening pages between 846 and 851, see ante, p. 796 to 798, inclusive.

† For the former part of this page of the 4th edition, see ante, p. 798.

presentative, yet that does not vary the description of the thing given by the will. So that the testator having discharged his personal estate, they [the heavier debts] are a charge upon the real: and only those contracted by himself charged on his personal estate: this also determines the objection as to interest, which was said to become his own debt; but that as well as the principal is within the description of heavier debts; for it would be strange to charge them upon separate funds."

ing the debts on the personal estate, will be to exhaust the whole of it, the personal estate will be exempted; because, in such case, it is presumed, that the testator meant some benefit to the legatee, to whom he has given his *whole* personal estate.

Devise of money to pay debts. Bequest of "all personal estate" to wife (the executrix). Debts amounting to more than whole personal estate, an exemption of that fund(L).

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The case of *Bamfield v. Wyndham* (o), is an instance of this sort. There I. S. devised all his manors to trustees and their heirs, in trust immediately out of the rents and profits, or by sale or mortgage of the premises, or any part thereof, to raise and levy money for payment and satisfaction of all his just debts, with interest and charges of the trustees; and if there should be a surplus of lands or money, that to be to his sisters jointly, and their heirs; and *all his personal estate* to his dear wife, whom he made sole executrix (M). The question was, whether the wife should have the personal estate exempt from debts, or whether that should be applied in the first place towards the payment of them? For it was urged, that the devise being to her who was made executrix, she should take it only as executrix. Lord Somers took notice, that the debts were more than the personal estate amounted to, and therefore the testator must mean, that the wife should have it exempt from debts, or he must mean nothing; and he said, there was in this case no room to make a different construction.

Bamfield v. Wyndham and French v. Chichester distinguished as to bequest of whole personal estate, and bequest of residue.

The reader should here be apprized of the distinction between the last case, and that of *French v. Chichester*, before-mentioned in this chapter (oo); for they approach each other so nearly in circumstances, that without the most cautious attention, they appear to have been decided in direct opposition

(o) *Bamfield v. Wyndham*, Pre. Ch. 101, et vide 3 Ves. 105.

(oo) [Ante, p. 792.—Ed.]

(L) Now otherwise, see post, 805, in *notis*; and for further observations on this case, vide ante, p. 763, et infra, 804.

(M) That the whole personal estate was in this case bequeathed, and not a residue, Lord Hardwicke said, in *Inchiquin v. French*, (1 Cox, 6) made a very material difference. Lord Somers, however, does not appear to have noticed that circumstance. The case of *Stapleton v. Colville*, post, 819, affords another instance where all the personal estate was bequeathed, which seems to have created some difficulty.

to each other; for, in both cases, the legatee was the wife of the testator, and was made executrix in the same sentence in which the personal estate was given; and, in both cases, the personal estate was inadequate to discharge the debts, &c.; and, consequently, the legacies would be defeated if it was so applied; both cases are decided by persons of the first judicial authority, and yet the adjudications are different. But they appear to me reconcilable, upon the ground, that the case of *French v. Chichester* was a disposition only of all the testator's personal estate *not otherwise disposed of*, and so in the nature of a *residuary bequest*; whereas that of *Bamfield v. Wyndham* was a disposition of the whole personal estate of the testator as *one entire thing*, and so given specifically; and in that light it is considered by Lord Hardwicke, in the case of *Lord Inchiquin v. French* (p); and, if so considered, the circumstance that the legacy will be defeated, if the personal estate is not exempted, is a *material index* to the intention (pp); because it lets in a principle, which has great weight in the construction of wills of personal property, namely, that *prima facie* the testator intends a positive benefit to every specific legatee; which principle does not apply to a residuary legatee, because, in our law, the residuary legatee is not so greatly considered, as he was in the Roman law, the residuum being taken with us as merely the gleanings of the testator's estate, and depending upon casualty, whether there shall be any such gleanings or not.

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The case of *Kynaston v. Kynaston* (q) must, I presume, have been also determined upon the principle, that, where the *whole* personal estate is bequeathed, and would be exhausted, if applied to exonerate the real, the presumption is, that it was meant to be exempted. In this case the testator, by his will, charged his estates with the payment of all his debts, legacies; and funeral expences; and, for that purpose, he devised particular lands to trustees, in trust to sell the same, and pay his debts, legacies, and funeral expences, and he gave to his wife *all* his personal estate whatsoever, and constituted her sole

Bequest of whole personal estate, which debts would exhaust, evidence that it was meant to be exempt.

(p) Vide Amb. Rep. 38.

(pp) [Sed vide for a different opinion, next page, note (N).—Ed.]

(q) Cited 1 Bro. C. C. 437, [note, and S. C. 3 Atk. 627.] Sed vide infra, *Adams v. Meyrick*, p. 809 a.

executrix. The debts exceeded the personal estate; and Lord Bathurst determined the personal estate to be exempt (N).

Legacies charged on real estate, whole personal fund given to A.—latter exempt from legacies, but not from debts.

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And this distinction, between a devise of the whole personal estate, and a devise of the residue, was also taken in the case of *Heath v. Heath* (r), where one, seised in fee of lands, and possessed of a personal estate, having children, and owing money, gave legacies by his will, and directed, *that they should be paid out of his real estate*, and gave *his personal estate* to his children. *Et per curiam*, if the legacies had been only charged upon the real estate, yet the personal estate should have been first applied to pay them, and so should it have been against a residuary legatee; but, in this case, the real estate being the fund appointed, and the *whole* personal estate given away by the will, *therefore* the legacies must be paid out of the real estate *only*; but the debts shall be still paid out of the personal estate, *the will not ordering the debts to be paid out of the real* (o).

(r) 2 P. Wms. 366.

Modern rule, that amount of debts make no difference in questions of this kind.

(N) In *Samuel v. Wake*, 1 Bro. C. C. 145, it was argued, that the personality was very small, only about 800*l.*, and the debts so considerable, nearly 13,000*l.* that they must swallow it up, and render the bequest totally nugatory, a circumstance which had been relied on in the decision of a similar case, *Bamfield v. Wyndham*; Pr. Ch. 101, where the Lord Chancellor took notice, that the debts were more than the personal estate amounted to, and, therefore, that the testator must have meant his wife to have it exempted from his debts, or he could mean nothing. Nevertheless, Lord Thurlow said, it was very clear there was not enough in the case before him to exonerate the personal estate, and so decreed; see ante, 799, n. (G). And this seems to be good law, for it appears to be now clearly settled that the intention to exempt must appear from the will itself, and cannot be collected from extrinsic circumstances. See post, 885 to 899. The consequence is, that parol evidence cannot be read to explain the amount of the debts, and, therefore, whether they are of small amount or of great magnitude, the construction which the will would receive, without reference to that fact, will not be varied. Accordingly, in *Aldridge v. Wallacourt*, 1 Ball & Bea. 312, the circumstance of the personal estate being only 2,400*l.* and the debts 30,000*l.*, was held to have no bearing on the merits of the case. And this latter doctrine was approved by Lord Eldon, in *Blundell v. Bootle*, 1 Meriv. 222.

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(O) As to the cases involving the question of exemption by means of a particular mortgage, legacy, or debt, being charged on the real estate, see post, 821, text and note.

The case of *Lord Inchiquin v. Lord O'Brien*, is grounded upon this distinction, between a disposition of the *whole* personal state, and a disposition of a *residue* only, in regard to the evidence they respectively furnish, as to the testator's intention with respect to the exemption of his personal estate.

Bequest of whole personal estate exempts it from debts, if real estate be charged therewith. Contra of bequest of residue.

Lord Thomond by his will (*inter al.*) devised in this manner (s): "As to my worldly estate, both real and personal, I dispose thereof as follows: First, I will that all my debts, which I shall owe at the time of my death, shall be paid;" (which was sufficient to charge his real estate with his debts, in case his personal estate had fallen short (p),) and then went on in his will, and devised, "his real estate to trustees, upon trust, that they should sell such a competent part thereof as should be sufficient for the payment of his debts and legacies." And his farther will was, that the [whole] money to be raised by sale of his real estate, *should be deemed* [and taken to be part of his personal estate;] and then he gave all the rest and *residue* of his *personal* estate [of what nature or kind soever and wheresoever being,] *after payment of his debts* [funeral expences] *and legacies* [unto the said Murrough Lord O'Brien(ss)]. And the question was, whether the personal estate, *viz.* that part of it which was properly so, his chattels, should go to Lord O'Brien, discharged of the testator's debts and legacies. Lord Hardwicke said (q), that there was no

(s) *Inchiquin v. O'Brien*, 1 Wils. 82.
[S. C. Amb. 33. 1 Cox, 1. Et vide
this case observed on, *infra*, 835.]
S. L. *Philips v. Philips*, 2 Bro. C. C.
275.

(ss) [The interpolations between
brackets are from Master Cox's re-
port of this case.—Ed.]

(P) *Williams v. Chitty*, 3 Ves. 545. *Shallcross v. Finden*, *ib.* 738. *Keeling v. Brown*, 5 *ib.* 359.

(Q) "By law and equity, to be sure, the personal estate is the proper fund to be first applied in payment of debts; and with regard to the ecclesiastical laws, it is the only fund for payment of legacies. If the personal estate is to be exempted from debts and legacies, it must be either by express words, or from a necessary implication, shewing the plain intent of the testator; and it need not be by express words, where, without them, the intent of the testator plainly appears. And where the personal estate is exempted from debts and legacies, it must be given in the nature of a *specific bequest*; and in such case,

Immaterial how debts are charged on real estate.

case wherever it was pretended, that the personal estate was exempted, where the *rest* and *residue* was given in this manner, namely, "after payment of my debts and legacies;" and the meaning of the testator must have been, that in case his personal estate should fall short, then that a competent part of his real estate should be sold; but to take off the force of this reasoning, it was insisted, that by these words in the will, "*And my farther will is, that the whole money to be raised by sale of my real estate shall be deemed as personal;*" the testator meant, that so much of his real estate should be sold, as should be equal to his proper personal estate, and should be added to the same, and that out of that aggregate fund, the debts, &c. should be paid, and after payment out of that aggregate fund, the residue should go to the residuary legatee, but his Lordship saw no foundation for this construction; for it was never heard of, that because a residue of a personal estate was given, that, at all events, some residue must pass by the will, for no man could tell at the time of making his will, how his personal estate might be increased or diminished,

For it does not follow that because a residue is given, a residue must pass (n).

another fund must be applied for the payment of the debts and legacies; every man having a right, as amongst his representatives, to subject what part of his property he pleases to the payment of his debts and legacies; and, I think, there is no substantial difference how the debts are charged upon the real estate, whether charged generally, or whether with directions to sell out and out, for in every one of these cases you will find the personal estate has been given in aid; therefore it will be impossible to lay down any settled and certain difference. The case of *Harewood v. Child*, [ante, 797, 8], is the first that ever came before the court, where it was contended, that the *residue* of personal estate should be exempt from debts, where the very express devise was after payment of debts, legacies, and funeral expences, and I own I did not expect to see it now. To take off the force of these words, it has been contended, on behalf of the plaintiff, that this residue means only the residue of the said fund which the testator ordered to be raised, and which he calls his personal estate; but there is no foundation for that construction. The words of the will, and not the circumstances of the testator, are to guide courts in their constructions and they will not say, that because a testator devises a residue, he necessarily meant that something should pass by that residue." His Lordship was therefore of opinion, that the personal estate should be first applied in discharge of debts and legacies, and so decreed. See 1 Cox Rep. 4. 5. 8. 9.

Courts guided by words of will not by testator's circumstances.

(R) "The residue of personal estate does not mean much; it is as it may happen," per Lord Rosslyn, in *Tait v. Northwick*, 4 Ves. 824.

or how long he might live. So he decreed the personal estate to be first chargeable with the debts and legacies.

A similar decision was made by Lord Northington against the interest of a *wife*, being a residuary legatee, in the case of *Stephenson v. Heathcote* (t). There one devised lands in trust, by sale or mortgage, to raise so much money as should be *fully* sufficient to pay all his just debts, and then gave a silver tobacco-box to A. B., and gave all the *residue* of his personal estate to his wife, and made her executrix; and Lord Northington ordered the personal estate to be first applied (s).

Devise to pay debts. Bequest of a trinket to A. and residue to B. Personal estate first liable.

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(t) Cited 1 Bro. C. C. 458. Ob- duced on other points, *infra*, pages served upon, 3 Ves. 106, [and intro- 889, 90, 1.—Ed.]

(S) The case of *Stephenson v. Heathcote*, as recently reported by Mr. Eden, supports a position widely different from that deduced from it in the text. The distinction between a bequest of the personal estate, and a bequest of the residue, where such residue comprehends the bulk of the personal property, was denied to be law, and it was incidentally held, that a bequest of the residue of personal estate, might, as such, be exempted from the payment of debts by implication, as well as a bequest of the entirety of that fund. It appears by the above report of this case (1 Eden, 38 and 43. S. C. 1 Meriv. 224, cited, in addition to circumstances mentioned in the text), that the testator left a personal estate of the value of 700*l.*, and was indebted on mortgage about 1500*l.* besides other debts. One question was, whether the personal estate should be exonerated from the payment of debts and funeral expences? Lord Northington said, the ruling principle in the construction of wills was, that the court was bound to find out the intention of the testator, if it were possible so to do, however inartificially the will might be expressed. But this intention was to be discovered from the words of the will itself, and not from extrinsic circumstances: and the court must proceed upon known principles and established rules, not on loose conjectural interpretations, or by considering what a man might be imagined to do in the testator's circumstances. Inquiries into the amount of the personal estate, to know whether it were or were not sufficient to pay the testator's debts were immaterial, because such inquiries would establish a rule, that in every case where the personal estate was insufficient, it must be presumed to be the testator's intention to charge his real estate with the payment of all his debts. Besides, the personal estate was vague and uncertain, and subject to great fluctuations: few men knew what would be the amount of their personal estate. In the present case, the testator having constituted his wife trustee of his real estate for payment of his debts, appointed her also to be his executrix. But although he had given her power to sell his real estate, "fully to pay and satisfy his debts," this was no more than making his real estate auxiliary to his personal, and not to be applied in the first place. The word "fully" was of great force and

Residue of personal estate may be exempted from debts by implication, as well as whole personal fund.

Court not to inquire into amount of personal estate, whether sufficient or not to pay testator's debts.

Effect of word "fully."

From near relationship of husband, wife, and child, presumed that will was intended to operate most favorably for them.

Although the single circumstance of the personal estate being devised to the wife by way of *residue*, seems not of itself to be sufficient to exempt it from exonerating a real estate devised for payment of debts, yet the circumstance of a wife or child being concerned, has generally induced a strong bias on the side of such a construction of the whole will, as will be favorable to an exemption of the personal fund; and therefore the Court of Chancery, especially of late years, since the fendal notion of favoring the freeholder has been growing weaker, and yielding to the more rational principle of complying with the intention of the owner of both funds, has laid hold of slight circumstances, raising minute shades of distinction, added to the presumption furnished by that of

effect: it was a word of reference, and shewed that the devise of the real estate was intended to be only in *aid*, according to the rules of law. The personal estate was to be first applied, unless it appeared to be the testator's clear intention to exempt it, and to throw the debts wholly on the real estate. And Lord Northington agreed with the determinations in the cases cited, that there was no need of express words in a will to exempt the personal estate from payment of debts, if the intent did otherwise appear; but he could not see any words in the will before him which indicated such an intention. As to the residuary clause, his Lordship looked upon the gift of the tobacco-box as nothing. An argument had been drawn from that, and the gift of the rest of the personal estate to the wife, that the testator's intention was to make the land the primary fund; but the personal estate might be given by the word "*residue*," as well as by words expressing "*all the personal estate*." Unfortunately for that construction, the clause did not end at the words "*for ever*," nor did it go on to say (as it should have done if that had been the intention) "*for her own use*;" but instead of that the testator added, "*whom I make my executrix*," which was a kind of legal trust; it was a devise to her as executrix. Another thing which had great weight with Lord Northington was, that the testator's principal object was a provision for his children. He could not be supposed to have so far preferred his wife to his children as to have given her the personal estate, free from the payment of debts, and to have thrown the entire burthen of them upon the estate to which he intended his children should become entitled after his wife's decease. And the event of his leaving no children was not to be alone attended to. Lord Northington was therefore of opinion, that there was not sufficient in the present will to exempt the personal estate.

Testator could not intend to prefer wife to disinherison of children.

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The learned author, in a subsequent note, conceives this case to be erroneously determined; see post, 810, n. (y). By the above report, however, it is clearly referrible to substantial grounds. And the case which it opposes was acknowledged by Lord Hardwicke to be a weak authority. See *supra*, author's n. (u).

the legatee standing in so favorable a relationship, to take such cases out of the general rule.

The case of *Adams v. Meyrick* (u), furnishes an instance of this kind, and may be considered as the leading authority on this head.

There A., by will, gave several pecuniary legacies, and after devised lands to trustees and their heirs, in trust, that they DID and SHOULD by mortgage or sale of the said premises, or any part thereof, pay and satisfy his debts, and the said legacies and funeral expences; then he devised all his goods, chattels, and household-stuff, in such a house, to another; and then went on in these words: "*All the rest and residue of my personal estate, I give and devise to my wife, whom I make sole executrix.*" *Per curiam*, the residue of the personal estate belongs to the wife, in the nature of a specific legacy, exempt from debts, legacies, and funeral expences; for though the personal estate is the natural fund for them, yet here he has expressly provided another for that purpose, by words of an imperative signification, "*that the trustees do and shall,*" (x) which is stronger than a bare charge of them on his real estate, and might be intended only auxiliary to his personal estate, which will, without words of exemption, be liable, in the first place; and though the words "*rest and residue of his personal estate*" are generally understood "rest and residue, after debts, legacies, and funerals," yet, here, they are relative to the last antecedent of the devise of his

Words "do and shall pay debts out of real estate," held sufficient to exempt residue of personally given to wife (T).

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(u) 1 Eq. Ca. Abr. 271, pl. 13. [S. C. 2 Atk. 626.] N. B. This case is said by Lord Hardwicke, [2 Atk. 626.] to be a weaker case than that of *Walker v. Jackson*, infra, 818, [et per Lord Al-

vanley, "*Adams v. Meyrick*, is a very weak case," see post, p. 835.—Ed.]

(x) Vide supra, *Stephenson v. Heathcote*, which, though very similar to this case, is decided the other way.

(T) The argument raised on the words "did and should" is certainly very refined, and such as would not, it is conceived, at the present day, be attended to. This case, and that of *Stephenson v. Heathcote*, ante, 807, 8, are at variance. The learned author, by his note (y) in the next page, appears to be of opinion, that this case is entitled to preference; sed vide the report of *Stephenson v. Heathcote*, as supplied by Mr. Eden, and furnished in the preceding note.

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continued.

goods, and chattels, and household-stuff, at such a house, and pass to his wife as a specific devise, *in the same manner as the next preceding devise did* to the devisee thereof, and are to be understood *the residue of what he had not before particularly devised*, not the residue after debts paid (y).

Personal estate, or any part of it; given a specific legacy not liable to operate real estate in mortgage, as between heir and legatee.

If the personal estate, or any part thereof, be given as a specific bequest, the heir or devisee of the real estate, will not be entitled to be exonerated by the personal estate or such part of it as is so given.

The case of *O'Neal v. Mead* furnishes an instance of this kind, in respect of chattels real (x). There, A. seised in fee of a real estate, which he had mortgaged for 500*l.* and possessed of a leasehold, devised the former to his eldest son in fee, and gave the latter to his wife, and then died, leaving debts which would exhaust all his personal effects, except the leasehold given to his wife. The question was, whether, there being (as usual) a covenant to pay the mortgage-mones, the leasehold premises, devised to the wife, should be liable to discharge the mortgage? And the Master of the Rolls, after taking time to consider of it, and being attended with precedents, decreed, that as the testator had charged his real estate by this mortgage, and, on the other hand, specifically bequeathed the leasehold to his wife, the heir should not disappoint her legacy by laying the mortgage debt upon it, as he might have done, had it not been specifically devised; and that, though the mortgaged premises were also specifically given to the heir, yet in this case, he to whom they were thus devised, must take them *cum onere*, as probably they were intended to pass.

[811]

Money may be specifically bequeathed.

Even money may be specifically devised, but then it must be under such circumstances of locality, and in such a situa-

(y) But this case may be supported on the same ground as the case of *Bradnox v. Gratwick*, *infra*, 819, viz. that the devise of the specific and residuary legacy is in the same breath; and which principle, also, seems to me applicable to the case of *Stephen-*

son v. Heathcote, which, I take it, was erroneously determined. [See ante, p. 809, *in notis*, for a different opinion.—*Ed.*] Et vide *Watnwright v. Bendloves*, as reported 2 Vern. 718. [S. C. post, 828.—*Ed.*]

(z) 1 P. Wms. 693.

tion, that the legatee may identify it, and say that he has a right to that *very* money in specie (v); for it is of the essence of a specific legacy, strictly speaking, that, by the assent of the executors, the property, in the identical thing, will immediately vest, and not remain fluctuating, until the arrangement of the testator's affairs; for, if that be necessary, it is not a specific legacy.

Thus, where the testatrix devised 400*l.* to the plaintiff S. to be paid to him out of 500*l.*, secured by a statute, &c. by C., and made the defendant B. her executor; on a bill brought

*Bequest of 400*l.* part of 500*l.* due on a statute, a specific legacy (v).*

(V) As for instance, the bequest of a sum of money deposited in such a chest, or in such a person's hands, or in such a trunk or bag. *Lawson v. Stitch*, 1 Atk. 508, and cases there cited, by Mr. Sanders.

(U) The difference between specific and pecuniary legacies consists in this: Pecuniary legacies must abate proportionably, to the exhaustion of the whole legacy, in case of a deficiency of assets to pay the testator's debts and general legacies. Whereas specific legacies abate only *inter se*, to pay debts, when all the personal estate, not specifically bequeathed, has been administered; but, on the contrary, they have this disadvantage, that if the specific funds fail, the specific legatees will be entitled to no contribution from the pecuniary legatees, nor to have the deficiency made up out of the general assets. *Sleech v. Thorington*, 2 Ves. 561. *Ashton v. Ashton*, 3 P. Wms. 385. If, therefore stock specifically given to be sold by the testator, or supposing the specific legacy to consist of a lease, the testator be evicted, or of goods, and they be consumed, or of a debt, and it be lost by insolvency of the debtor,—in all these cases the specific legatee will not be entitled to contribution from the other legatees; and not being so entitled the courts say he shall not be liable to contribute towards the payment of their legacies in case of a deficiency of the funds on which such legacies are charged. *Long v. Short*, 1 P. Wms. 403. and see 2 Black. Com. p. 512. (*Ellis v. Walker*, Amb. 310; and see *Webster v. Hale*, 8 Ves. 415, and *Simmons v. Vallence*, 4 Bro. C. C. 349), since, contrary to the probable intention of the testator, it often proves a hardship upon the specific legatee, who by an alteration of a part of the property, may find nothing that answers the description; and it often proves hard also on other legatees where there happens to be a deficiency. It is a rule, therefore, that no legacy is to be held specific unless clearly so intended; see *Sibley v. Perry*, 7 Ves. 529. *Att.-Gen. v. Parkin*, Amb. 568, and *Ashburner v. McGuire*, 2 Bro. C. C. 108. Another source of difficulty is, that a specific legacy vests immediately upon the death of the testator, and, unlike a pecuniary legacy, carries interest from his death. *Barrington v. Tristram*, 6 Ves. 345. And it may be here observed, that the court determines upon the face of the will, whether the legacy is specific or pecuniary, and does not, it seems, look into the account of the effects to see whether that shall be turned into a specific legacy which upon the face of the will is to be taken as pecuniary. *Innes v. Jackson*, 4 Ves.

Specific and pecuniary legacies distinguished.

by S. against B. for payment of the money (a) the question was, whether this was a specific legacy? And it was held so to be; and decreed to be paid to the plaintiff.

So is bequest of money on bond held in trust for testator.

So, where I. S. having money secured to him by bond, in the names of A. and B., in trust for himself, devised it; the court held, that the devise of this sum of money was a specific legacy (b) (w).

(a) *Smallbone v. Brace*, Swinb. 28. 1 Eq. Ca. Abr. 299, pl. 2. [S. C. on other points, Pr. Ch. 99.—Ed.]

(b) *Lord Castleton v. Lord Fanshawe*,

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373. See vide *Foumerson v. Pointz*, 1 Bro. C. C. 472, and *Pags v. Leapingwell*, 18 Ves. 463. To authorise a departure from the words of the will, it is not enough to doubt whether they were used in the sense which they properly bear but the court ought to be quite satisfied that they were used in a different sense, and ought to be able distinctly to say what the sense is in which they were meant to be used. *Att.-Gen. v. Grote*, 3 Meriv. 321. With respect to *Foumerson v. Pointz*, the Master of the Rolls, in *Att.-Gen. v. Grote*, observed, that Lord Thurlow was struck with the enormous disproportion between the stock the testatrix had, and what, by the construction which was contended for, she must have been taken to have given; the latter being ten times as much as the former. In a case precisely the same, the Master of the Rolls said he might be disposed to follow that precedent, although, even there, it was not without great difficulty that the court was prevailed upon to admit the extrinsic evidence as to the state of the property, in order to explain the intention of the testatrix, see 3 Meriv. 319.

Distinction between bequest of bond and money due on bond, exploded.

(W) A distinction has been taken between the bequest of a bond or other security, and the bequest of a sum of money due on a bond or other security. The bequest of a bond has always been held to be a specific legacy. But Lord Camden appears to have been of opinion, that if a sum of money due on a bond be given to A., it will not be a specific legacy. *Attorney-General v. Parkin*, Amb. 566. Lord Thurlow, however, thought the distinction between "I bequeath the sum of 500l. due on a bond from A. B.," and "I bequeath the bond from A. B.," too slender to be relied on. *Ashburner v. McGuire*, 2 Bro. C. C. 111. In *Chaworth v. Beech*, 4 Ves. 566, the Master of the Rolls observed, that Lord Camden, in deciding the case of *Attorney-General v. Parkin*, proceeded on this idea, which was substantial, that the testator did not mean any particular mortgages, bonds, and securities, but any mortgages, bonds, and securities that he might happen to have; if so, that was sufficient to sustain *Attorney-General v. Parkin*, without holding that *Ashburner v. McGuire* had overturned it, which Lord Thurlow did not mean to do, though he intimated his doubts. But *Ashburner v. McGuire* established this, that if the legacy is meant to consist of the security, it is specific; though the testator begins by giving the sum due upon it. It would be time ill spent, his Honor said, to go over the cases commented on by Lord Thurlow. He should

Again, where the testator, having devised \$4000. to be laid out by his executors in a purchase of annuities, in the Exche- *So is bequest of sum to be laid out in Exchequer annuities.*

therefore only further observe, that Lord Thurlow mentioned *Castleton v. Penahew*, *ubi supra*, in the text, in which the legacy of a debt was held as much specific as the devise of a farm. If that case were accurately stated (and it was in a very good book, and also in Pr. Ch. but upon another point), it was an authority perfectly conclusive upon the subject, and fully sufficient to warrant *Ashburner v. McGuire*, and upon a very attentive perusal of that case, the Master of the Rolls declared himself to be of opinion, that it was put upon a ground that could not be mistaken [namely], that such a legacy, unless there is a ground for considering it a legacy of money, and that the security is referred to only as the most convenient mode of paying it out of the assets, is as much specific as a legacy of a horse or a cow, or any moveable chattel whatsoever. Therefore, upon the authority of *Ashburner v. McGuire*, with all the inclination he felt to support the legacy in the case before him as a pecuniary legacy, his Honor was of opinion, that though the gift was of money due on a note, yet that it was a specific legacy.—See also *Fryer v. Morris*, 9 Ves. 363, where the legacy was of money due on a note. Sir W. Grant's observations on that were:—"It is said this is a pecuniary legacy, as it is a bequest of the money to be received, but that is the case of every bequest of a debt;" *et vide further Roberts v. Pocock*, 4 Ves. 150. *Kirby v. Potter*, *ibid.* 748. *Coleman v. Coleman*, 2 *ibid.* 640. *Gillaxme v. Adderly*, 15 *ibid.* 384; and *Acton v. Acton*, 1 Meriv. 178. From the whole we may conclude that the above distinction is now exploded, and that the bequest of money due on a certain bond or mortgage is as much specific as a bequest of the bond or mortgage itself.

Bequest of money due on note, specific.

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It may not be without its use to add, that legacies of stock in the public funds are usually considered as general legacies, and not specific, unless there is any thing in the will to shew that the testator intended to confine it to the stock he had at the time of his death. *Aselyn v. Ward*, 1 Ves. 425. *Purse v. Snaplin*, 1 Atk. 414. A gift, therefore, of "1000*l.* out of Reduced Bank Annuities" has been held to be a pecuniary legacy, *Kirby v. Potter*, *ubi supra*; but see Lord Eldon's expression in regard to this case, in *Deane v. Test*, 9 Ves. 154. In like manner, where there was a legacy of stock in the 4 per cent. consols, a legacy to the same persons of "an additional sum of 2000*l.* more to be paid out of the 4 per cent.," was held to be a pecuniary legacy, *Deane v. Test*, and see *Petersburgh v. Mortlocke*, 1 Bro. C. C. 565; and even a bequest of "12,000*l.* of my funded property to be transferred, &c." was held to be a pecuniary, and not a specific legacy. *Lambert v. Lambert*, 11 Ves. 607. And if Bank Annuities are directed by will to be purchased out of personal estate, the bequest will be considered as a pecuniary legacy. *Gibbons v. Hills*, 1 Dick. 324. But it should be remembered that it hath also been held, that a legacy of "100*l.* Long Annuities stock," or of "my stock," or "in my stock," or "part of my stock," is a specific legacy. *Attorney-General v. Grote*, *ubi supra*. *Sibley v. Perry*, 7 Ves. 322. *Ashton v. Ashton*, Ca. Temp. Talb. 152; *sed vide Wilson v. Brownsmith*, 9 Ves. 180.

Bequest of stock, a specific legacy, when.

quer, for ninety-nine years term, to be enjoyed by his wife for her life, *she releasing her dower*, and after her decease to go equally to his two daughters, bequeathed 1000*l.* a-piece to the latter, and died, leaving little more assets than would pay the 3400*l.*; the court held, that the legacy of 3400*l.* was specific, for it must be taken as the devise of an annuity, and therefore was a specific legacy (c) (x).

Bequest of personal estate to alter administration of assets, viewed with jealousy.

[814] But here we must remark, that the devise of the personal estate must be clear, certain, and exactly defined, not loose and equivocal, or it will not operate so as to alter the ordinary course of applying assets; an infraction upon which the courts of justice view with a jealous eye, and never permit but where the intention of the testator (who had an absolute power over his property) to appropriate it otherwise is clearly expressed, or necessarily implied.

Bequest of money to be laid out in land, a general, not a specific legacy.

Therefore (d), when the testatrix bequeathed several pecuniary legacies, and, amongst others, gave 1500*l.* to her eldest son, in trust, to lay it out in the purchase of land in fee, and to grant a rent-charge of 50*l.* *per annum* thereout to his daughter, the plaintiff M., the wife of H., for her separate use; but that, if her eldest son should refuse or neglect to lay out 1500*l.* in a purchase, and to grant this rent-charge, then he should have but 500*l.* of the money, and the remaining 1000*l.* should be laid out, as far as it would go, in the purchase of an

(c) *Burridge v. Brady*, 1 P. Wms. 127. Swinb. 21. Sed vide infra, 814, 539. S. C. Swinb. 29. (d) *Hinton v. Pinke*, 1 P. Wms. this case explained.

P. 813

continued.

Bequest of money to be laid out in lands, or on annuities, not a specific legacy.

(X) Lord Cowper's words were:—"The 3400*l.* shall have the preference, and if there be not assets enough to pay the other legacies, they must be lost. It is of some weight that these annuities are to go to the children after the wife's death, but especially as the wife is a purchaser of the annuities for her life, by her releasing her dower; and money ordered by will, or articulated to be laid out in an annuity, or in lands, is in equity looked upon as an annuity or land, and consequently to be taken for a specific devise; it is therefore to be preferred before a pecuniary legacy."—His Lordship's opinion in this latter particular has since been over-ruled, and it now appears to be settled, that bequests of money to be invested in the purchase of lands or annuities are general legacies, and must therefore abate with pecuniary legatees. See *Hinton v. Pinke*, post, p. 814, and *Hume v. Edwards*, 3 Atk. 693.

annuity, for the separate use of the daughter: The question was, whether the 1500*l.* was a specific legacy? And, on the part of the plaintiff, it was insisted that it was; because it was ordered to be laid out in land, and consequently was to be taken as a devise of land, by which means it was become a specific devise. But Lord Parker held otherwise; for, admitting the 1500*l.* legacy should be taken as land, the question would be, what the legacy was, or how much should be laid out in land? The legatee of the 1500*l.* could not say that she had a right *in specie*. Was it possible, supposing there had been, in the present case, 140*l.* of the testator's money laid upon the table, the legatee could say, that she had a right to this money in specie? If not, then it was no specific legacy. But, his Lordship observed, the will saying, that, in case of the son refusing or neglecting to make this purchase, then he was to have but 500*l.* of the 1500*l.* legacy, and the daughter the remaining 1000*l.*; therefore he took the daughter to be a general legatee for 1000*l.*

Lord Parker (afterwards Lord Macclesfield) in the last case, said, that though he could not come into the opinion of Lord Cowper, in the case of *Burridge v. Bradyl*(e), yet, if it were insisted upon, he had such a regard for the precedent, as cited, that he would see the decretal order; but this was not urged. But Lord Hardwicke, in delivering his judgment in the case of *Blower v. Morret* (f), explains the reason of this seeming difference of opinion between Lord Macclesfield and Lord Cowper, on the case of *Burridge v. Bradyl*, and confirms the law to be as was held by Lord Cowper in that case. His Lordship observed, that the reason Lord Macclesfield was not satisfied with that case, when cited in the case of *Hinton v. Pinke*, was, because, according to the book, there was a wrong state of it; namely, barely as though it were a gift of money to be laid out in land, without stating the circumstance, that it was given to purchase an annuity for the wife, *she releasing her dower*, which was the true foundation of that determination; for, his Lordship said, he laid no weight on what was mentioned besides by Lord Cowper as of some weight, namely,

Lords Macclesfield and Hardwicke's observations on Lord Cowper's doctrine in Burridge v. Bradyl.

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(e) Ante, 813.

(f) 2 Ves. 420. 422.

that the annuities were to go to the children after the wife's death, for that was only as to hardship; nor that it was directed to be laid out in land, which would not vary the case, for it would be still a pecuniary legacy, and must then abate in proportion. The strong ground was, that it was a purchase of the widow's dower, by giving her a sum of money in lieu and satisfaction of and upon her releasing it; and the wife might lay hold of that if she would. It was the same as if the testator had said, "I give A. £500*l*. on consideration that he conveys such an estate to my devisee or trustee."—A. has then an option to say, that is a contract, he closes therewith, and will make it absolute, and will part with that estate for that money, and then he will not be bound to abate in proportion with other legatees.

Residue specifically bequeathed, is exempt from debts if real estate be charged therewith (v).

And, if ever a residue of personalty should be so devised as to partake of the nature of a specific bequest, that will also be exempt from exonerating the real estate.

Accordingly, it is said to have been argued by the counsel at the bar, and not denied by the court (*g*), that, if the testator's lands were subjected to his debts, and all the rest and residue of his personal estate were given to a stranger, *without any allusion to debts*, and the executors *bequeathed* to the testator's wife, or any other person; there, the residuary legatee would be entitled to have the residue and surplus, so devised to him, exonerated and discharged of the debts; and, in such case, the real estate, expressly charged, or devised to be sold, would, in the first place, be wholly applied to the purpose, and the personal estate would only come in aid of the real so devised to be sold, to supply what the real estate fell short to make up the debts: for such bequest would operate in the nature of a specific bequest of such residue.

Mode of bequeathing personal estate should be attended to.

And, in these cases, too much attention cannot be given to the mode in which the personal estate is disposed of, in respect

(*g*) Gilb. Eq. Rep. 72, 73, [et vide post, 828.—Ed.]

(Y) The latest case on this head is *M'Leland v. Shaw*, 2 Sch. & Lef. 544, introduced in the first section of the note to p. 846, *infra*.

of the general disposition thereof; the relation between the particular and residuary clauses; the connection between the testator and his legatees; the object of the testator in giving his legacies; and other minute circumstances, which persons in the habit of inspecting wills of this kind will readily perceive; as trivial circumstances frequently implicate important facts, and furnish decisive evidence of a testator's intention to give the personal estate exempt or not exempt from his debts.

For instance, if a testator appears to have viewed his personal estate as an entire thing, and to have contemplated a positive and express disposition of the whole, and to have deliberated to what extent it should be charged, his disposition will be considered as in the nature of a specific bequest of an entirety, though given in several distinct parts; and therefore the several parts *with the residue*, in compliance with his intention, will be construed to make up the whole; and consequently the residuary, or sweeping clause, will not be taken in its ordinary sense, as the residue after payment of debts, but in a peculiar sense referrible to the preceding disposition, and involving all that is left, after taking out what has already been given.

Personally viewed as an entire thing, and given in parts, residue specific, as well as parts.

The case of the *Attorney-General v. Barham*, cited in the case of *Stapleton v. Colville*, furnishes an instance of this kind (A). There the testator devised in the following words: "For the just and true performance of this my last will, and for the payment of all my debts, I give and devise all my real estate; and as to the personal estate, which at the time of my death I shall be possessed of and entitled unto, I give the same unto my executor and executrix herein named, to defray my funeral charges and expences; and, if my personal estate shall fall short to discharge the same, then the remainder to be paid by my executors out of the first rents and profits of my real estate, as they shall become due after my decease, until payment be made of all my legacies, debts, and funeral expences, as aforesaid; and, if there be any surplus of my personal estate, that then my executor pay the same to my dear and loving wife;" and it was decreed that the personal estate

Devise for payment of debts, if personal estate deficient, rents to be applied, residue to wife, held exempt from debts.

(A) Ca. temp. Talb. 206. Et vide *Adams v. Meyrick*, ante, 809.

should go to the wife, discharged from payment of debts. The ground of which decision was by Lord Talbot said to have been, for that the testator had laid the charge upon the real estate, and then, taking up his personal estate, mentioned particular things which he charged it with, from whence it was concluded that the surplus there meant, must be the surplus after the particular charges there specified.

Devise of estate in trust for, and charged with debts. Bequest of part of personality as heir-looms, and residue to A. who is not executor. Residue exempt.

It seems that upon the same principle (i), if a man were to devise his real estates in trust for, and charged with, the payment of his debts, legacies, and funeral expences, remainder in trust for A. B. in tail, remainder over; and then to devise *part of his personal estate* to go along with his real as *heir-looms* (k); and afterwards devised all the rest and residue of his goods, clothes, and personal estate, not before bequeathed, to A. B., and made his trustees executors, that A. B. would take the residue discharged from the debts; for, in such case, upon strict grammatical construction, rest and residue not before bequeathed, is properly referrible to the bequest which precedes, and then the residue being given to a person not properly affected with debts and legacies, there appears to be no reason to charge him therewith, by inference that it is to be, *after debts and legacies paid*.

Any other circumstances, evincing that the testator meant to shift the burthen of his debts from the personal to the real estate, will produce that effect.

Devise of part of estate, in settlement—of residue, for debts, with declaration that latter being deficient, former shall be applied, an exemption of personality.

Thus, where A. gave several specific parts of his personal estate, and then gave part of his real estate in strict settlement (l), and devised the remainder of his real estate to trustees in trust, to sell for the payment of debts, and in case that should not be sufficient to discharge the debts, he charged the deficiency on the devised real estates, and then gave the residue

(i) Vide *Dolman v. Smith*, Pr. Ch. 456; ante, 795.

(k) Pr. Ch. 453. Gilb. Eq. Rep. 128, where this proposition is countenanced. [See also *Wainright v. Bendlowes*, post, 828, for a case perfectly parallel; and for other cases

where heir-looms have been devised; see *Brydges v. Phillips*, introduced in a note to page 841, post. *Tower v. Rous*, 18 Ves. 137, and *Bootle v. Blundell*, infra, 846.—Ed.]

(l) *Anderton v. Cook*, 4th June, 1775, cited 1 Bro. C. C. 456.

of his personal estate, not before bequeathed, to his wife; the court held, that she took it wholly exempt from the debts. The ground of which determination must have been, that the charge of the deficiency on the devised real estates was demonstration that the testator meant, that the personal estate should be exempted from the debts.

Again (m), where W. by will devised lands to trustees, to be sold for payment of his debts and legacies, and devised all the residue of his personal estate to his wife, and gave her also 600*l.* out of the money to be raised by sale of the trust estate, and made her executrix; on a bill for an account of the personal estate, and to have that applied in the first place, Lord Harcourt, Chancellor, observed, that here was not only a devise over of the residue of his personal estate to his executrix, but that he gave her father the sum of 600*l.* out of the real estate, so that he did not think the residue of the personal estate sufficient for her; which furnished the strongest presumption imaginable of the intent of the testator, that his wife should have the residue of his personal estate, and on this ground dismissed the bill *quo ad* an account of the personal estate.

*Devise in trust to sell and pay debts. Bequest of residue of personally to wife, and 600*l.* to her also, out of produce of sale. Personal fund exempt.*

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Again (n), where one seised of divers real estates, and also possessed of a personal estate, devised that all his estate in L., or a sufficient part thereof, should be sold as soon as his executrix conveniently could for the payment of his lawful debts, and the legacies thereafter mentioned, and the expence of his funeral, &c. he gave to E. one annuity or yearly rent-charge of 200*l.*, to be raised out of all his estate not thereafter otherwise disposed of, in the county of N., to be paid her half-yearly; and then, after giving several legacies, lastly, he appointed the above-mentioned E. and B. joint executrices of his will. Afterwards, and at a future time, the testator added these words to his will: " And I give and devise to them (the

Bequest by codicil, of personal estate not before disposed of to executrix, held a specific legacy, and inapplicable to debts, real estate being charged therewith.

(m) *Waive v. Whitfield*, 2 Eq. Ca. Abr. 374, pl. 23. 8 Vin. Abr. 237, pl. 19.

(n) *Walker v. Jackson*, 2 Atk. 624.

[S. C. 1 Serjt. Wils. 24. Bunb. 302, and *infra*, 833, where it is cited and observed upon by the Master of the Rolls.—*Ed.*]

executrices) *all my personal estate not hereinbefore devised,*" and then he executed the will over again. The principal question was, whether the personal estate ought, in favor of the heir at law, to be applied in exoneration of the real estate? And Lord Hardwicke was of opinion that it ought not, for that there was a manifest plain intention to give the personal estate as a *specific* legacy to his executrices, and to exempt it from his debts; because, after giving several specific legacies, he said, "Lastly, I appoint the above-mentioned E. and B. joint executrices of this my will." If the testator had rested there, it was only making them executrices, and the personal estate would have been applicable to exonerate the real estate; but the testator some time afterwards added the words, "and I give and devise to them all my personal estate, not herein before by me devised," and in a formal manner re-executed his will. This, his Lordship said, was an extremely strong circumstance to shew the intention of the testator, and indeed insurmountable (z).

[819]

Specific legacy and residue bequeathed in one sentence to same legatee a case of exemption.

So, where the devise of the residue of the testator's effects was made in the same sentence with a devise of specific legacies to the residuary legatee, this was considered by Sir Joseph Jekyll as the case of exemption.

Lord Hardwicke's reasoning in the above case pronounced unsound by Lord Thurlow.

(Z) The observation made on this by Lord Thurlow, in the case of *The Duke of Ancester v. Mayer* (MS. cited by Lord Eldon, 1 Meriv. 223) was, that the very circumstance here laid hold of to shew that the personal estate was to be exempt, was a circumstance on which other judges presiding in the Court of Chancery had relied, as affording the contrary conclusion. Lord Thurlow said, that Lord Hardwicke's reasoning on this point was far from being sound reasoning; and referred to *Stephenson v. Heathcote*, cited 1 Bro. C. C. 458, 466, observing, that he entirely concurred with the principle there laid down, viz. that the gift of personal estate to one who is appointed executor, is not to be considered as a legacy exempt from the payment of debts; and then added, that there were twenty instances where the circumstance of giving to the executors had been turned to a purpose directly contrary to the use which Lord Hardwicke made of it in *Walker v. Jackson*. For this reason, Lord Thurlow concluded that the notion of deciding by precedent in questions of this nature must be abandoned; and that the court must, in every such case, abide by the clear intention;—which, indeed, all judges affected to go upon, but seldom agreed on the principles to be applied in collecting it.

In the case alluded to (e), one charged his lands with the payment of his debts, and gave some specific legacies, *together* with the rest of his personal estate, to his brother; in which case, forasmuch as the specific legacies would be exempt from the debts, as betwixt the devisee of the land and the specific legatee, so the court declared they could not sever the specific legacies from the rest of the personal estate; and since the testator equally intended that the residuary legatee should have the rest of his personal estate, as the specific legacies, therefore all the personal estate was held to be exempt from the debts.

And where the real estate was not only charged with debts, but an actual power was given to the executor by mortgage or otherwise, to raise such a sum as would be adequate to defray them, Lord Talbot was of opinion this circumstance clearly manifested an intent to incumber the real fund with the debts.

Estate charged with debts, with power for wife to sell and pay same, devise to N. he taking name, &c. Bequest of personalty to wife (ex-contris).

Thus (p), where one by will devised his lands to his wife for life, *chargeable* with the payment of *two* annuities for the lives of the annuitants, and likewise with a legacy of 1000*l.*, and gave her a *power* to raise, by mortgage or sale of any part of the inheritance, such a sum as would be sufficient to discharge the debts he should owe at the time of his death; and then reciting the great satisfaction he had of his estates having continued so long in his name and family, and the great desire he had no perpetuate, as far as he could, his name and estate, he devised all his real estate (after his wife's death) to his nephew for life, remainder over to his first and other sons in tail, upon condition of their taking and using his name and arms for ever; and, in the close of his will, gave *all* his goods,

Letter fund exempt.

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(e) *Bradnor v. Gratwick*, 20th Nov. 1792, at the Rolls, cited 3 P.Wms. 325.

(p) *Stapleton v. Colville*, Ca. temp. Talbot. 201. Et vide *Hale v. Brooker*, Gilb. Eq. Rep. 72, 73, a case prior in time, wherein a similar question arose on Sir Matthew Hale's will, wherein a like circumstance appears, viz. a power to lease lands for pay-

ment of debts; and it seems from Lord Hardwicke's citing this case as an authority in that of *Walker v. Jackson*, that it received a similar adjudication. Vide 2 Atk. 626, [and for the case of *Hale v. Brooker*, ante, 786, note (k), et vide what Lord Alvanley says of the principal case, post, 833. Ed.]

chattels, and personal estate to his wife, and made her sole executrix. The question was, whether the wife should take the personal estate exempt and discharged from the payment of debts, or whether the personal estate should not, according to the general rule, be first applied? It was decreed at the Rolls, that the charge should be entirely upon the real estate, and that the wife should have the personal estate to her own use; and that decree was affirmed by Lord Talbot, Chancellor, on the ground, that upon the whole frame of the will, such appeared to be clearly the testator's intent; and his Lordship relied upon the circumstances following, *viz.* that after the gift of the *annuity and legacies* wherewith the testator had charged his real estate, he gave his real estate to his wife for life; and although it did not necessarily follow, that the coupling the annuities and legacies together, shewed he intended both to be payable out of one and the same fund (the personal estate being the proper fund for debts, though no provision had been made by the testator, but the annuities having no fund to answer them, except what was particularly provided for them), yet that must have some weight (*pp*); but then came the power given to the wife, which seemed to him very clearly to manifest this intent that she should take what he had given to her by his will to her own use; for, his intent being to carry down and perpetuate his estate in his name and family, could it be supposed, that after having given his wife the whole power over his personal estate, by making her executrix, he would likewise have given her a power of disposing of so much of the inheritance, and consequently of defeating the devise to his nephew (not of so much as the personal estate should prove deficient, *but of what should be necessary for the payment of his debts*), unless he had intended her the personal estate absolutely to her own use, clear and discharged from the payment of his debts? His intent seemed clear to give her this power of disposing of so much of the inheritance as would satisfy his debts, in order to secure her the full enjoyment of her estate for life, and of the personal estate, free from all charges whatsoever.

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(*pp*) [Very little importance can be attached to this argument now. See ante, 805, note (N).—*Ed.*]

The reader will no doubt have observed, that in several of the preceding instances, the wife of the testator was the object of his bounty: But although that circumstance might possibly furnish an additional reason in support of those adjudications (because the relative situation of the testator and his legatees, and also of the legatees to each other, are features that ought not to be overlooked in a question upon the intent of a testator, where the influence of natural affections on the actions and inclinations of men are universally acknowledged to have great weight), yet these cases seem to be furnished with circumstances sufficient to take them out of the general rule without referring to this additional feature, in respect of which they are also distinguishable from the common run of cases.

Additional ground for pronouncing cases in favor of wife, good law.

A condition, *though void*, annexed to a legacy, making it payable out of the land, was held to be sufficient to shew the testator's intent that the personal fund should not be charged with it (A).

Devise to A. he paying particular legacy, exempts personal fund, though A. be heir at law, and condition, as such, void.

(A) The following are instances where the devise of an estate charged with the payment of a particular mortgage debt or legacy has been held to exempt the personal estate from the payment of the particular burthen so exclusively fastened on the real fund.—In *Phipps v. Annesley*, 2 Atk. 57, a testator gave his only daughter the sum of 3000*l.* at her age of 18 or marriage, and declared that the trustees should levy and raise by mortgage or sale of his lands, together with his personal estate, as much as would pay the 3000*l.*, but that it should not be raised till 18 or marriage, out of the before-mentioned estate or land, *that it might not be a debt on his personal estate*. Lord Hardwicke held, that the personal estate was exempted, and that the 3000*l.* was a charge on the real estate only. So in *Reade v. Litchfield*, 3 Ves. 475. J. R. devised all his real estate to trustees for a term of 500 years, in trust to raise several sums of money, some of which were debts secured by the testator's bond and covenant, and others in the nature of legacies as provisions for different branches of the testator's family. Lord Rosslyn considered the intention on the whole will to be clear, that the testator did not mean to give these sums as debts, or legacies, but as portions out of the land. He therefore decreed that they should be raised out of the real estate in exoneration of the personal fund.

Particular mortgage, legacy, or debt charged on real estate, an exemption of personal fund.

In *Wood v. Dudley*, 2 Bro. C. C. 316, Lord Dudley, by his will, after devising real estates in manner in his will mentioned, charged all the residue of his real estate, with the payment of all his debts, legacies, and sums of money which in that his will, or in any codicil thereto, he (the testator) should give, bequeath, or direct to be paid, in case his personal estate should not be suf-

Real estate to pay debts in case of deficiency of personal fund, and charged with particular

In the case alluded to (*g*), A. by his will, amongst other things, devised as follows: "I give and bequeath to my ne-

(*g*) *Whaley v. Cox*, 2 Eq. Ca. Abr. 549. [See also for a similar point, *Bridgman v. Dove*, ante, 788.—Ed.]

portions for
younger chil-
dren, held first
liable to the
portions.

cient to discharge the same, which he did thereby will, should be first applied for that purpose, and, subject thereto, he gave all other his manors, &c. to the defendant for life, with remainder to the plaintiff for life, with remainders over; and reciting, that by his marriage settlement he had agreed to settle 5000*l.* as a provision for younger children, he subjected and charged the last-mentioned estates to the payment of 5000*l.*, to be paid to the plaintiff at his age of 25 years, with interest from the testator's death, at 4 per cent., and after payment of debts and legacies, he gave the residue of his personal estate to the defendant. The cause came on before Lord Thurlow, C. 11th July, 1787, when his Lordship ordered the sum of 5000*l.* and interest, to be raised by sale or mortgage of the residuary real estates of the testator, and gave proper directions for that purpose; upon which the plaintiff presented his petition of appeal, contending that the said sum was payable in the first place out of the personal estate. On the re-hearing his Lordship said, he thought the case was perfectly clear when it came on before, and though he had listened with great attention, it did not seem that there was any ground for argument; the testator said "I charge the last-mentioned estate with the payment of the said 5000*l.*" This was in its nature and constitution a real charge; the question then was, whether any other parts of the will took up this bounty *de novo*, or directed it to be raised or applied in any other manner, than as directed by the above clause. The main argument rested on the words "legacies and sums of money directed to be paid by the will." Lord Thurlow really did not know how to distinguish these expressions, they meant nothing more than legacies, but would not affect real charges. Comparing therefore all these clauses together, his Lordship thought he had hardly ever met with a clearer case, and he must therefore affirm the decree, which he did accordingly. See 1 Cox. C. C. 438.

Devises in tail
empowered to
raise particular
legacies, evi-
dence that such
were intended
to be charged on
real estate only.

In *Amesbury v. Brown*, 1 Ves. 481. S. C. infra, 926, 7, the testator gave his real estate generally, after payment of debts and funeral expences, without mentioning legacies; afterwards he bequeathed four legacies to each of his four sisters; and in the same clause added, "all which legacies I mean shall be paid out of my freehold estate in N.;" and by a subsequent clause gave a power to the devisee in tail to mortgage and charge the real estate for payment of that money. It was insisted that a legacy given generally is payable out of the personal estate, and though afterwards made a charge on the real, yet as the heir at law is not to be disinherited, the court looks on it that unless the personalty is expressly exempted the legacies shall be payable out of the personal fund. Lord Hardwicke said, this case was not within the common rule, not being a common charge on the real estate in aid of the personal, but an express incumbrance on that estate—an express gift of the legacy out of the real estate, which, wherever done, the realty must bear that burthen, and not

phew B. (who was the testator's heir at law), his heirs and assigns, all my messuages, &c. in the parish of O., in the county

the personalty, and this was strengthened by the subsequent clause, whereby the testator meant the tenant in tail should have power to do it even without suffering a recovery.

The next case involved not only the question under discussion, but the whole subject generally. It may not be inappropriately introduced here. W. H. by his will, gave to his wife and H. S. all his manors, &c. as well freehold as copyhold, in the counties of M. and B. or elsewhere, in England, upon trust to sell the same, and apply the money in manner following, viz. that they should in the first place pay off the sum of 3000*l.* due on mortgage of his freehold estate at H. and interest; and in the next place raise the sum of 2000*l.*, which he gave and bequeathed to his two daughters M. and E. equally. And upon further trust, that his wife should take the rents and profits of the residue of his estates left unsold for her separate use, and after her decease he devised all such residue of his estates to his two daughters and their respective heirs and assigns, as tenants in common. And as to all the rest and residue of his personal estate (after payment of all his just debts, legacies, and funeral expences) the said testator gave the same to his wife absolutely, and appointed her and H. S. guardians and executors. The question was, whether the mortgage debt, and the legacy of 2000*l.* were to be paid out of the personal estate of the testator; or whether the personal estate was exempt. The Master of the Rolls observed, that as to the legacy of 2000*l.* he could not consider it as a general legacy; nor conceive of the personal estate as in any degree charged with it, for that sum was given only as a part of the produce of the real estate. The real estate was devised upon trust to be sold, and an application of the money was directed, in the first place, to pay the mortgage of 3000*l.*, and then in the next place the trustees were directed thereout, viz. out of the money produced by the sale, to raise the sum of 2000*l.* which the testator gave to his two daughters—that meant not, as it was contended for the plaintiffs, a sum of 2000*l.* in gross, but a sum of 2000*l.* as part of the produce of the real estate. The general rule was perfectly established, that in order to exonerate the personal estate there must be either express words, or a plain intention. It might have been better if the whole rule had been adhered to, namely, that nothing but express words should operate in exoneration of the proper fund. But it was then too late to contend, that the personal estate might not be exonerated by other means. [See also *S. L. Watson v. Brickwood*, 9 Ves. 453.] The intention might be found not merely in the mode in which the personal estate was given, but also in the mode in which the real estate was given, or the application directed to the payment of that debt; for the real estate might be so appropriated to the payment of the debt, as to shew a clear intention that it should not be a burthen upon any other fund, though an intention to exonerate the personal estate was not in any other way expressed. This case came as near to that as possible, viz. a declaration of intention that the real estate should be exclusively burthened with this debt. It was true, that a devise to sell for payment of all debts would not exempt the personal estate. But a direction to apply a particular portion of the real estate for

Devise in trust to sell and pay mortgage, and raise another sum which testator gave to his daughters. Personal estate though bequeathed after payment of debts and legacies, exempt on the plain intention.

[823 *]

To exonerate personally express words or plain intention must be found in will.

Inference from direction to apply particular portion of es-

of G.," and then reciting that he had promised to give to his

*tate in payment
of particular
debt.*

the payment of one particular debt afforded a very different inference. Why should the testator direct exclusively a particular debt to be paid out of his real estate? It was not generally from an apprehension that the personal estate might not be sufficient for all the debts; for no precaution was taken, except for this particular debt; and this debt was already a charge on the real estate. Therefore for the security of the debt there was no reason to direct the sale. It was no additional security to the mortgagee. For what purpose, then, could the testator so specially direct a portion of the real estate to be sold, and the produce applied to that particular debt; if he intended that debt to stand just in the same predicament as any other debt; except, only, that it was to be charged upon the real estate; as it already was? Putting that aside nothing was done by all this particularity of expression, for then the debt stood upon the same footing as all other debts. His Honor then cited the case of *Hale v. Cox*, and after considering its relation to the case before him, concluded by observing, that he gave his opinion not without doubt and hesitation on account of the strong expressions of judges in former cases. It was impossible to say it was so clear that no doubt could be entertained upon it. If that sort of case was required, certainly it did not exist in the case before him, for the direction for payment of all debts and legacies out of the personal estate, raised an ambiguity, to get rid of which he was driven to construction. The decree declared the personal estate to be exempt; and the 3000*l.* having been raised, directed the 2000*l.* to be raised by sale of a sufficient part of the real estate. *Hancock v. Abbey*, 11 Ves. 179.

*Though devise
to pay parti-
cular debt may
be an exemption
in favor of le-
gates, yet will
it not be so for
next of kin,
supposing le-
gacy lapsed.*

[824*]

But it should here be remarked, that although in general cases, if a testator devises his real estate upon trust to sell and raise money to pay off a particular mortgage debt, or a particular legacy, the mortgage or legacy will be a burthen on the real estate exclusively, yet in a case where a testator had expressly charged his real estate with the payment of a particular mortgage debt, and disposed of his personality to persons who died in his life-time, whereby the bequest of the personality became lapsed, it was held that the personal estate should again become liable to exonerate the real estate; for it did not follow, that because the legatee should take the personality exempt from the mortgage debt, that the next of kin should take it so too; and the legatee being dead, it was the same thing as if the testator had said nothing in his will about his personal estate, in which case a mere gift of the mortgaged premises, subject to the mortgage, would not have exempted the personality. Thus in *Hale v. Cox*, 3 Bro. C. C. 322, the testator having two estates in mortgage, the one called Millstones for 300*l.* and the other situate at Piper's Row, for a sum not mentioned, by his will directed that the said mortgages, and all other his just debts and funeral expences should be fully paid out of his personal estate; he then gave several legacies, and bequeathed the residue of his personal estate to trustees, in trust, to cause a true inventory to be made thereof, and to protect and preserve the same in the best manner they should be capable of for I.; but if he should happen to die under twenty-one, without lawful issue, then for M. He then gave real estates to the same trustees upon trust for the benefit of I. and M. and gave all other his messenges un-

niece W. 500*l.* (to be paid to her within six months after his

disposed of, which included the premises in mortgage, called Milstones, to the same trustees in trust, if they should think proper, to sell and dispose of such his said messuages as should be on mortgage at the time of his decease, and after payment of all principal monies and interest that should be due on any such mortgage, the testator directed his trustees to place out the remaining part of the purchase-money at interest, on securities, and to pay the interest to his daughter C. I. for life, with remainders for the benefit of her children; he then gave his trustees discretionary powers with respect to the mortgaged premises if they should think proper, to continue them in mortgage to the then mortgagees, or to borrow money of other persons on mortgage thereof, the rents and profits thereof, in that case (after payment of interest, &c.) to be to the same uses, with an ultimate remainder to his own right heirs, and appointed his trustees executors. I. and M. both died in the testator's life-time, and the executors of the mortgagee filed the present bill, praying, among other things, an account of the personal estate of the testator; and if it should appear insufficient to pay what should be found due in respect of the mortgage, that the deficiency might be raised by sale of the mortgaged premises, or other parts of the testator's real estates. The case being argued, Lord Thurlow observed, that the testator appeared very anxious to give no real estate till after the payment of the debts. The will stated, that if it were more convenient for the family, the mortgaged estate should not be sold, but other money borrowed upon it, to pay the mortgaged debt. Was it possible, then, to throw the debt upon the personal estate? Could it be construed that the testator intended it to be sold, and that so much as exceeded the 300*l.* should go to the legatee; that the 300*l.* mortgage money should be paid by the personal estate, and the 300*l.* which continued real, descend to the heir at law? It would be too much to attribute this intention to the testator. Upon the whole of the will, it seemed, that he meant the personal estate should pay the other mortgage, but as to this, that it should be exonerated for the benefit of the legatees. But although the intent was that the legatee should take the personal estate exempt from the mortgage debt, it did not follow that the next of kin should take it so too. The legatees being dead, it was the same thing as if he had said nothing in his will about his personal estate. "It must devolve," added Lord Thurlow, "in the ordinary way, as if it stood without any expression of a desire to exempt the personal estate, and then the personal estate must be applied." *Hale v. Cox*, 3 Bro. C. C. 332.

Hale
v.
Cox.

In another case also, the benefit of the exemption of the personal estate was confined to the legatee. The will recited that the testator, since his marriage, had purchased the manor of Ince, but to enable him to do so had mortgaged the same, and other premises for the purchase-money. He then devised all his estate and interest in the said manor of Ince, subject to the annuities, bequests, and directions, as by his said will, or any codicil he might give to his wife for life, and after her death to such uses as she should appoint, with remainders over in default of appointment. The testator bequeathed several legacies and annuities, and gave the residue of his personal estate to his

Same law.

Exemption by implication.

decease), went on and said, "and my will is, that my said estate at O. shall stand charged with the said sum of 500*l.* to be

*Waring
v.
Ward.*

wife upon trust to discharge all his debts, for which at the time of his decease, he should not have given real securities, and all such bequests and annuities (not including those before mentioned) as he should therein, or by codicil give, and with which he should not expressly charge his estate at Ince. The testator's wife died in his life-time. The will was not re-published, and his second wife took out letters of administration with the will annexed, whereby she became entitled to the personal estate, against whom, and her second husband (Ward) the heir at law filed his bill, charging that the mortgage was not the old burthen on the estate when the testator purchased; but that he mortgaged the same in manner aforesaid, and personally borrowed 30,000*l.* and pledged the estate as a collateral security for re-payment; and did not purchase the said estate, or any part thereof, subject to such debt; and praying that the real estate might be exonerated. The Master of the Rolls said, that with respect to the question to be determined, he had no difficulty in declaring that it was impossible upon the will to raise any presumption, that the testator meant to exempt the personal estate in favor of this defendant from those debts, which if there were no exemption would be a charge upon it. Nothing was more clear upon principle than that if there were a gift in favor of a particular legatee, and he died, no benefit that legatee could have claimed, if he had survived, could be set up against the persons to whom the estate would come, subject to the disposition in favor of that legatee if he had lived. If, for instance, an estate had been given to A. and the personal estate to B. exempt from debts, that exemption was to be considered as intended only for the benefit of B., that he should not pay those debts to which he would be liable, if no such provision had been made, and was not a general exemption of the personal estate. Where an exemption was created for the benefit of a particular person, not for the benefit of the estate generally, if that person could not take it, the benefit never arose. The testator, in the case before his Honor, had never expressly charged the personal estate with debts. He gave the estate he had purchased charged with annuities, and such other annuities, bequests, and directions, as he might afterwards give to his wife for life, with a power of appointment; he afterwards gave the personal estate, not in words of exemption, but with words of charge that were upon fair inference equivalent to words of exemption from debts, for which he should at the time of his decease, have given real securities. The first Mrs. W. would have taken the personal estate discharged from those debts. The clear effect in point of law was a gift to her of the personal estate with the benefit of this exemption, but there was no inference, upon which any one else could claim that benefit. Upon the true construction of this will, the discharge of the personal estate could operate only in favor of the first wife. "Declare, therefore," the Master of the Rolls added, "that the bequest of the residue of the personal estate to the testator's wife became lapsed by her death in his life; direct an account of the debts, and how they are secured, and of the personal estate; and reserve the consideration whether the plaintiff is entitled to have

All benefit attached to a legacy, lapses with it, in case of legatee's death in testator's life-time.

paid at the time aforesaid; and I have devised my said estate to my nephew B. his heirs and assigns, upon condition he pay the said sum of 500*l.* at the time aforesaid; and one question was, whether this 500*l.* was charged upon the real or personal estate in the first place? And it was decided by Sir Joseph Jekyll, that the 500*l.* ought to be taken as a charge upon the land at O. in *the first place*; because the testator did not only charge his lands at O. with this 500*l.* as he did with several other legacies and annuities, but he distinguished this 500*l.* by devising these lands to B. in fee, on condition that he paid the 500*l.* and though this was a void condition, as the devisee was heir at law, and none but the heir could take advantage of the condition, upon which reason also the devise was void, the lands decending to B. as heir at law, yet this particularity in the will served to shew the intention of the testator, that these lands at O. should be applied to the payment of the 500*l.* in the first place, and not the personal estate.

But where the condition, annexed to the devise, was not a condition to avoid the whole estate charged with the debts in default of payment, but was to be taken advantage of by an entry given to the creditors and legatees, it was determined that the personal estate should not thereby be exempted.

Devise to A. he paying debts—in default, creditors to enter, personal estate not exempt.

the estate descended to him, exonerated from the money due by mortgage to Mrs. Trevor, at the date of the indentures of 1771." *Waring v. Ward*, 5 Ves. 670. The case afterwards came on for further directions on the equity reserved, and is reported 7 Ves. 332. Et vide *infra*, 851, for the later cases on this subject.

It is merely necessary to add, that there appears to be a distinction in cases of exoneration between a devise upon trust to sell and pay off a mortgage, or a devise expressly charging the real estates with the mortgages thereon, and a devise subject to a mortgage merely. In which latter case there is no ground to presume an intention to exempt the personal fund by throwing the burthen exclusively on the real estate. See *Hale v. Cox*, ubi supra, and post, 877. But the words "subject to a mortgage," would, it is presumed, have a different effect in a conveyance or settlement. See post, 875, 879, and these observations may be made without interfering with what was said by the Lord Chief Baron in 7 Price, 264, or by Lord Eldon, in 1 Meriv. 230, or by Lord Manners, in 1 Ball & Bea. 316, viz. that neither a mere charge, nor a direction to sell, nor the creation of a term, for payment of debts, will, of itself, be sufficient to discharge the personal estate, as the primary fund.

[826 *]
Devise subject to mortgage no exemption; contra, if estate be charged with, or devised in trust to pay mortgage.

[827]

Thus, where (r) a man made his will, and I. S. his executor, and gave him a legacy of 20*l*. and devised all his lands to I. N. and his heirs, upon condition that he paid his debts and legacies; and if the debts were not paid within two months, then he devised that the creditors and legatees might enter; and the question was, whether in this case the personal estate should be first applied in ease of the real estate? It was contended, that the personal estate should not be liable in this case; and it was said, that it was the same as if the testator had devised lands to I. N. upon condition to pay 20*l*. to A. and 20*l*. to B., and in that case, without question, the devisee of the lands could have no advantage of the personal estate. But it was held by the Lords Commissioners of the Great Seal (viz. Maynard, Keck, and Rawlinson), that the personal estate was first liable in this case; but they went upon different grounds. Lord Commissioner Maynard said, that if a man devised his real estate to another, upon condition to pay his debts, and did not dispose of his personal estate, that should be first applied in ease of the real estate; and here the condition annexed to the devise, was not a condition to avoid the whole estate, but only to give an entry to the creditors and legatees. Keck rested upon the ground, that an executor did not take on his own account any more than an administrator; and Rawlinson said, that there was a diversity betwixt a *hæres factus*, and devisee of particular lands; for a devisee of particular lands should not have the benefit of the personal estate, but *hæres factus* of the whole estate should.

General devisee entitled to benefit of personal estate. Contra of particular devisee. See ante, 815.

Intention to exempt personal fund not provable, dehors the will.

There is also a class of cases to which this rule, as to the exoneration of the real estate, does not apply, but which are frequently discussed as falling under its influence, for want of adverting to the causes on which the rule is primarily founded; for if these causes are not to be found in the case, it is out of both the spirit and the letter of the rule.

Rule now independent of feudal principles.

It has been observed, that this rule, as to the application of the personal estate to exonerate the real, in cases where the real estate is subject to debts, or charged therewith, or, where

(r) *Gower v. Mead*, Pre. Ch. 2. S. C. 2 Vern. 120, [ante, 789.—Ed.]

a trust is created for that purpose, was built on feudal notions, to support the tenure, and preserve the feud entire. Then it can never apply where the feud is to be completely charged; as if the real estate be to be sold out and out, and turned into personalty; for, in such case, there is no heir either *factus* or *natus* to be favored; the sole question lies between the owners of the personalty, which of them shall bear the burthen, and then it is fair to leave it where the testator has placed it.

Therefore, if a testator directs his lands to be sold and converted into money (*s*), and disposes of all the money to arise thereby, after the payment of his debts thereout, as money, and gives his personal estate to his executor; this furnishes a strong ground to presume, he intended that his land should not be exonerated by his personal estate; because, in such case, it is plain that the testator means to reduce his whole estate into one species of property, to be disposed of as he directs; and then the direction, that part of the money to arise by the sale of the land shall be applied to the payment of debts, is in truth only an appropriation of a particular part of that general fund to a given purpose. And, in such case, the principle of equity, which induces the court to favor the *hæres natus*, or the *hæres factus*, does not attach; because the testator leaves no real estate to be preserved for either; on the contrary, the case falls under another principle, of as operative a nature as that, to which we have lastly alluded, namely, the principle, that whatever is directed to be done, ought to be considered as done, under which rule the land so appropriated ought to be considered as money.

Testator directs sale, and gives money after payment of [828] debts, as money, personal estate not exonerated.

The case of *Wainwright v. Bendlows* (*t*), decided by that great master of equity, Lord Cowper, falls under this distinction. There, one by will devised all his fee-farm rents, in the county of N., to trustees and their heirs, in trust, to sell the same for payment of his debts, and the residue of the money

Devise in trust to sell and pay debts, and residue to A. Bequest of goods as heir-loome, and residue of personal estate]

(s) Ca. temp. Talb. 108. *Ackroyd v. Smithson*, 2 Bro. C. C. 503.

(t) *Wainwright v. Bendlows*, Pre. Ch. 451. S. C. 2 Vern. 718. [Gilb. 125. Amb. 518.]—Note, this is a spe-

cific devise of residue. [See ante, 815, 16, 17, for cases on specific bequests of residues. See also *Hartley v. Hurle*, 5 Ves. 540, and infra, p. 839, in note.—Ed.]

to B. This residue a specific bequest, and exempt (u).

[829]

arising thereby he devised to his two sons, equally to be divided between them; then he gave several of his goods to go along with his estate as heir-looms, and devised all the residue of his stock, goods, and chattels, to his sister, whom he made his executrix (u). The question was, whether the personal estate should be subjected, in the first place, to the payment of debts in ease and exoneration of the real estate devised for that purpose? It was contended that it should, on the ground that such was the constant course of the court. But it was argued on the other side, that here was an express fund devised for the payment of his debts; and a distinction was taken between a bare charge on the testator's real estate for payment of his debts, as by a devise of a term thereout for that purpose, and this case; for that he had given his lands out and out, and had parted with them for ever, so that he never intended any of them should remain in his family; that these lands were therefore to be looked upon as money, and consequently in a court of equity were part of the testator's personal estate, and that the residue of his goods, chattels, and stock, must be intended the residue of those, which were not specifically devised as heir-looms (x), and not the residue, after

(u) Note, in *Vernon* it is said to be devised to his brother John, his brother Phillip, and brother-in-law, Wainwright.

(x) N. B. This last distinction of

Lord Cowper, is not approved of by Lord Hardwicke, Amb. 38. Rejected, *ibid.* 39, not mentioned in Amb. Sed vide *Adams v. Meyrick*, *supra*, 809.

P. 828

continued.

Residue not specifically bequeathed, if it means surplus after payment of debts.

(B) The case of *Bowman v. Reeve*, Pre. Ch. 578, affords an instance, by way of distinction, where the residue was held to mean a surplus after payment of debts and legacies. At least so it may be inferred from the observations of the Chancellor, who said that the residuary legatees had nothing to their own use but the residue after the debts and legacies paid, and this residuum was chargeable with the debts; the creditors, it was true, might take what part they thought fit in satisfaction of their debts, and the enumerating of particulars in the devise of the residuum made it no more a specific devise than as if the testator had only said, in general, all the rest and residue of his goods and chattels, or such like words. The residuum was therefore held liable to the payment of debts, and although the creditors thought fit to fix on other parts of their debtors estates, and thereby to deprive the specific legatees of what was intended them, yet in consideration that such was contrary to the testator's intention, his Lordship declared a recompence to the specific legatees out of the residuary fund.

debts paid. Lord Cowper was clearly of this opinion, and decreed, that the personal estate was not in this case liable to the debts (c).

So, in a late case (y), where a testator devised his real estate to be sold, and the money to arise by the sale to be applied to pay mortgages and other debts, *the residue to be added to his personal estate*; the only question was, whether, under this devise, the real estate should exonerate the personal estate? It was contended that it should not. That to produce such effect, there must be a destination as to the estate to be sold for the mere purpose of the payment of debts. That here there was only a direction *in transitu*, and the words did not necessarily imply, that the personalty was to be exempted. But Sir Lloyd Kenyon, then Master of the Rolls, held, that the intention to exonerate the personal estate was clear; he said, he laid no great stress upon words, but he must lay some upon the words, "when sold, the money to be applied to the payment of mortgages, and all other debts;" and his Honor farther observed, that the testator had directed the residue to be added to the personal estate; but, according to the construction contended for, that could not be done: he declared that the money arising from the sale was to be applied to the payment of debts, in exoneration of the personal estate.

Devise to sell, "and when sold," to pay mortgages and other debts, residue to be added to personal estate. Produce of real estate to be first applied (D).

[880]

(y) *Webb v. Jones*, 2 Bro. C. C. 60. S. L. *Donne v. Lewis*, *ibid.* 257.

(C) Lord Hardwicke, in quoting this case as reported in Vernon and Precedents in Chancery, said, there was some difference in the two books of Lord Cowper's reasons; and Lord Hardwicke must own, that he was not satisfied with Lord Cowper's reasoning as to the bequest of the residue of the personalty, as reported in Vernon, for it was very dangerous. See Amb. 38. This explains the author's unintelligible note (x).

P. 829
continued.

(D) Where lands are directed to be sold, and after payment of debts the surplus monies to go with the personal estate, so as to make them one joint fund, there is no reason for distinguishing between the application of the funds; for the person entitled to the residue cannot fail to have the residue of that very fund which the testator has created for the payment of his debts. See ante, p. 795, 6. *Twissdale v. Coventry*, 1 Bro. C. C. 360; and *Harley v. Hurle*, 5 Ves. 546, 7. Et vide ante, 795, 6.

Rule inapplicable where funds are amalgamated.

Devise in trust to pay debts, and invest residue.—After legacies, gift to wife (who is executrix) of goods, &c. Personally exempt from debts and legacies, but not from funeral expences.

So, where C. devised a manor to trustees in trust to sell (x), and directed the monies, to be raised thereby, to be paid in discharge of all his debts, and after payment thereof, in the first place, to invest the residue, and pay the interest to his wife for life, and the principal, after her decease, to his nephew; and after several specific and pecuniary legacies, gave to his wife all his goods and chattels, and appointed her executrix: it was held, that the personalty was exempted from the debts and legacies, but was subject to the funeral expences; and it was decreed accordingly.

Executor directed to pay all debts. Devise of manor, &c. subject to incumbrances to A. Personal estate must exonerate manor of mortgage (z).

Although the mortgagor devise the estate subject to the incumbrances, which are upon it at the time of his decease, yet if, from other circumstances, there be ground to infer, that the testator did not thereby intend to exempt the personal estate from exonerating the real estate, that fund will, notwithstanding, be first liable to the charge.

Thus (a), where one seised in fee of a manor and lands near G. in S., that were in mortgage, and likewise seised in fee of other lands, begun his will by “directing that his executor should pay and discharge ALL his just debts, and that he should raise sufficient to pay the same, and then devised his manor, &c. at G. to I. S., at the age of twenty-one or marriage, subject nevertheless to the incumbrances, that were, or should be, upon it at the time of his decease, and in the mean time, and until I. S. should arrive at her said age or marriage, the rents, issues, and profits, to be paid by his executor into the hands of her father and mother, which ever should be living at the time of the testator's decease, for the plaintiff's sole benefit and advantage, and then de-

(z) *Holliday v. Bowman*, cited 1 Bro. 386, et vide *Aspley v. Earl of Tankerville*, 3 Bro. C. C. 548. [S. C. 9 Mod. C. C. 145.]

(a) *Serie v. St. Eloy*, 2 P. Wms. 398.—Ed.]

(E) So, if a testator expressly exempts his personalty from the payment of mortgages, and devises the mortgaged lands subject to incumbrances, the lands descended shall be liable to pay off the mortgage money in favor of the devisee. *Barnwell v. Lord Cawdor*, 3 Madd. Rep. 453, cited also post, 855, in nota.

“vised to his brother L. C., and his heirs, the reversion of
 “the manor of W., (after the death of M. F.) subject nevertheless to the payment of such of his debts as should remain
 “unpaid. And all the rest of his real and personal estate,
 “not therein before specifically disposed of, he devised to
 “J. S. E., his heirs and assigns, in trust to sell and dispose of
 “the same, as soon as conveniently might be after his decease,
 “and thereout to pay his debts and general legacies; and in
 “case there should be any deficiency, and that any of his
 “debts and legacies should remain unpaid, then he charged
 “the same on the reversion and inheritance of the manor of
 “W., and thereby directed the said L. C., and his heirs, to
 “pay off the same within six months after the death of M. T.,
 “and he made the said J. S. E. sole executor.” At the time
 of the testator’s death, the manor, &c. at G. in S., remained
 in mortgage to one H. for 500*l.*, and the question on a bill
 filed in Chancery was, whether this mortgage debt of 500*l.*
 should be discharged by the executors and trustees of the testator,
 or should be left upon the estate devised; and his Honor decreed,
 that *all* the debts and general legacies of the testator were by his will
 to be paid out of his personal estate, and the real estates devised
 to the defendants I. S., E., and C., and that the mortgage of H.,
 on the estate devised to I. S., was to be taken as one of those debts.
 And this decree was affirmed on appeal to Lord King.

The circumstance from whence the court seemed to have concluded in the above case, that the testator had no intention to exempt his personal estate from exonerating the real, by devising it, subject to the incumbrance thereupon, appears to have been, that the devise of the other lands was to pay *all* his debts; which word *all* is omitted by Peere Williams in his report of the case, although it appears on the record of the proceedings. Accordingly, Lord Thurlow, in the case of the *Duke of Ancaster v. Mayer* (*b*), observes, “that the case of *Serle v. St. Eloy*, went upon the idea of the charge upon the real estate being the *debt* of the testator.” But his Lordship

*Observations
on last case.*

(*b*) 1 Bro. C. C. 461, [fully acquiesced in by Lord Alvauley, post, 837, and stated at large, post, 863, 4—*Ed.*]

observes, "that if that case were recent, and had not been followed, he should have thought upon the face of it, it was very open to argument."

Debt contracted by testator, and debt contracted by his ancestor, distinguished as to trust for payment of debts.

And in the case of the *Duke of Ancaster v. Mayer*, Lord Thurlow distinguished the case of a *charge subsisting*, from that of a debt contracted, under such circumstances of a devise to pay debts; holding, that where there was a charge inherent in the estate, and prior to the deviser's title, neither his personal nor real estate, devised to pay such testator's debts, should be thereby charged with such incumbrance (F).

Two cases have lately occurred upon this subject, in which his Honor, the present Master of the Rolls, has fully considered the authorities upon the subject, and drawn such conclusions from them, as place the principle in a clear point of view.

Real estate devised to trustees (not executors) for payment of

In the case of *Burton v. Knowlton* (c), A. devised all her freehold, copyhold, and leasehold messuages, &c. and all her real estate to two trustees, upon trust after her death, with all

(c) 3 Ves. 107, [et vide 18 Ves. 138, cases of exemption, on the authority 139; also infra, 851, for two recent of the above.—Ed.]

(F) Lord Thurlow's words explain themselves much better without than with the learned author's commentary; but it is questionable whether the distinction at this day be entitled to much attention. The words were the following:—"the difference between the cases is, that if it had been real estate mortgaged by the father, it would have been liable only as a charge, but in the present case, the debt of the father falls upon the estate in two ways, partly as being a charge, and partly as being a debt upon the personal estate."

What weight attaches to circumstance, that trustee of real estate is executor.

It is also observable, that in the case of the *Duke of Ancaster v. Mayer*, as in many of the preceding cases, very considerable stress was laid on the circumstance of the persons who were appointed executors, being the same to whom the real estate had been before devised as trustees. In other cases this circumstance is considered as less material, but the degree of weight to which it is entitled depends upon the whole of the will taken together; and, if a distinction is to be discovered, from the beginning to the end of the will, between what they are called upon to do in the character of executors, and what as trustees; and if the testator directs them, as trustees, to do that which is properly the duty of executors, this is a circumstance which deserves also to be attended to, in determining which is the manifest general intention of the testator—per Lord Eldon, in *Boote v. Blundell*, 1 Meriv. 227.

convenient speed to sell, &c. all, or any part of, her real estate; and, with the money arising from the sale, to pay off and discharge all the mortgages and incumbrances in any wise affecting the real estate, and also all other her just debts and *funeral expences*; and to lay out the surplus in stock, and to pay and apply the clear rents and profits of her real estate, or so much as should not be sold, and the clear annual income and produce of the money arising from the sale, after payment of the debts, for the benefit of her friend B. for life, and after his decease to convey, apply, and dispose of all such parts of her real estate, and the produce thereof, not sold or applied, to the heirs or heir at law of her cousin C. The testatrix then gave her family pictures, &c. to her heir at law. She gave several legacies to several persons, and 50*l.* to each of her two trustees, over and above a reasonable recompence for their trouble, which she directed them to retain out of the trust premises: then, after giving several other legacies, she gave 200*l.* to be paid by the said trustees, after the decease of B., to such person and persons, and in such manner and form as he should, by any deed or writing under his hand, appoint. All the rest and residue of her personal estate and effects whatsoever, not before specifically disposed of, she gave and bequeathed to the said B., his executors and administrators, upon trust to pay, apply, and dispose of the same, to such person and persons, and in such shares as she should, by any writing to be executed by her, appoint: and for default of appointment, she gave the residue to the said B. for his own use and benefit, and she then appointed him executor.

debts and funeral.—Residue of personal estate bequeathed to A. in trust, as testatrix shall appoint, in default to A. who is made executor.—He takes residue beneficially exempt from debts.

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The testatrix died without having made any appointment. The only question was, whether the estate not specifically disposed of, or the real estate, should be first applied in discharging the debts.

Et per Master of the Rolls. This is one of those cases that come so often before the court, and which have given rise to such difference of opinion upon the bench, that it cannot be wondered that I have taken so much time, both in this and in the case of *Brummel v. Prothero* (cc), the next cause that

Judgment.

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stands for judgment, and upon which I confess, if the consideration of the one did not involve that of the other, I should not have taken so much time; however, upon full consideration of the will, and fully subscribing to the principles that swayed the court in *The Duke of Ancaster v. Mayer* (d), I am perfectly satisfied this testatrix did intend to give her personal estate to B., exempted from the payment of debts. The cases are very numerous, and great judges have differed upon them: some have thought the words sufficient to exempt the personal estate; others have thought they did not afford that demonstration. I shall not go into the circumstances of the cases. There are certainly many ingredients in this that seem to have been relied upon by judges, who have thought the personal estate not exempt. The circumstance that the trustees are not the executors affords a strong inference as to the real intention, and is always favorable to the exemption of the personal estate and I desire to have it understood, that though the words "*funeral expences*," comprised in this trust, occur in some of the cases, and are held not to have any considerable weight, yet that is where the trust fund is given to the executors, to whom the personal estate is afterwards given; and I cannot but think, that where the trust fund is given, with such general words to trustees, who are not the executors, upon whom the *funeral expences* would naturally fall, it does afford a considerable argument, that the testatrix did not mean the personal estate to be the fund for all those charges that naturally fall upon it. The subsequent words of the residuary clause convince me, that she did not mean to give [the residue to her executor] as executor, but as a specific legacy, and exempt from the debts; for so far from being given to him as executor, and his being entitled to it as such, it is given to him upon trust, to dispose of it according to her appointment, and for default of appointment for his own use, and then she makes him executor.

Trustees not
being executors,
evidence favor-
able to exemp-
tion of personal
estate.

[834]

There must be
something tan-
tamount to ex-
press words to
exempt personal
fund from debts.

I need not state the principles which have been so often commented upon, in *The Duke of Ancaster v. Mayer*; that unless there are words, not express, but tantamount to express,

(d) Ante, 831.

so as to afford demonstration plain, that the personal estate is intended to be given as a specific legacy, and exempt from the payment of debts, it shall be taken subject to them. Great stress was laid in the argument on the word "residue," and it was said, in *The Duke of Ancaster v. Mayer* (e), the court laid great stress upon that word. I think, in that case, a great deal of argument did arise from that word, as there applied; but I cannot read this will without giving to the words "rest and residue," a meaning totally distinct from residue, after payment of debts; for these words, coupled with the words "not specifically bequeathed," mean only such parts of the personal estate as are not specifically given, which alludes to what she had before given to the heir, or to the leasehold estates given to the trustees. There are so many shades of difference between *The Duke of Ancaster v. Mayer* (f) and this case, that a thousand arguments might arise in that, that do not arise in this; and when I read *Walker v. Jackson* (g), before Lord Hardwicke, who certainly differed from Lord Talbot; and when I read Lord Thurlow's judgment in *The Duke of Ancaster v. Mayer*, I cannot think the word "residue" bears, upon this case, as it did on that, for there the trustees were likewise executors. The testator gave all his personal estate to the person entitled to the rents and profits of his real estate; it is not given as a residue, as here; but all his personal estate so given, he himself afterwards calls by the name of residue; and then, upon which Lord Thurlow very justly laid the greatest stress, and which, I think, put it out of the power of the court to exempt the personal estate, he nominates the same persons executors of his will, who were trustees for the payment of the debts; and directs them to discharge his funeral charges, and all his debts and legacies, as soon as they should become due and payable, as counsel should advise, and to satisfy themselves out of his personal estate, or the trust fund; all disbursements, expences, and charges, they should be put to in proving, or in the execution of the will. Lord Thurlow thought it too much to say upon such a gift, the trustees holding both funds, and having an option to pay out of both promiscuously, that the personal estate was intended to be exempt.

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Knowlton.

Residue in this
will means re-
sidue not speci-
fically given.

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(e) Ante, 831.

(f) Ibid.

(g) Vide ante, 818.

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Knowlton.

Too late to say
express words
are necessary to
exempt personal
fund (a).

Great doubts were entertained upon that case at the time, but I most heartily subscribe to it. But Lord Thurlow there says, what has imposed a most grievous task upon the court; that it is too late to say express words are necessary. There are many cases determined in favor of the personal estate, which I should have great difficulty to acquiesce in; *Adams v. Meyrick* (h) is a very weak case. In *Stapleton v. Colville* (i), the circumstance laid hold of by Lord Talbot does not satisfy my mind, nor does it seem to have satisfied Lord Hardwicke and Lord Thurlow, viz. the mere circumstance of the executor having a power to raise so much out of the term as would be sufficient for the debts. I have felt great anxiety and difficulty for fear of drawing so nice a line, that judges can hardly tell how to guide themselves in determinations of this sort. I have looked very carefully at *Walker v. Jackson* (k), and it must be remembered that Lord Hardwicke, who determined that case, thought the words not sufficient in *Lord Inchiquin v. O'Brien* (l); in the former he considered all the cases. In applying that case to this I am perfectly satisfied, that if he was right in the consequence he drew in that case, I am warranted in that which I have drawn in this. It was upon the codicil that Lord Hardwicke's opinion turned, as affording a presumption for the exemption of the personal estate; but if the report is right, he did not rest merely upon its being by way of codicil, but thought, that if it had been in the will, it would be a strong case for the exemption of the personal estate; so I think, for the codicil is only part of the will, and it is to be taken altogether. This testatrix having given this fund in the largest words to pay all mortgages and incumbrances, and all other debts, and even her *funeral expences*, to persons who are not then naturally to pay them, gives the rest and residue, not before specifically bequeathed to the person whom she makes executor; but not as executor, for she had an intention of appointing it, and then in default of appointment, she gives it to him for his own use. Compare

(h) Ante, 809.

(k) Ante, 818.

(i) Ante, 819.

(l) Ante, 806.

(a) For similar observations, see 9 Ves. 453, and 11 Ves. 186.

these words with *Walker v. Jackson*. I think I am perfectly warranted in saying, there is demonstration plain that she did not mean to give it to him as executor, but specifically for his own use and benefit, and exempt from the payment of debts. I have had great difficulty, and am much afraid of breaking in upon established rules, which I never desire to do. There is a case which is not reported, and was suggested by me, and deserves some account to shew that the principles of it are not broken in upon: it is *Gaskill v. Hough*, Feb. 1774, in which I was counsel. The court thought the personal estate exempted. That depended upon very different principles; it was neither a charge for debts, nor a devise for payment of debts, for I am not one of those judges who think there is much difference, whether it is the one or the other, unless there is demonstration that the personal estate is intended to be exempted: that case was not a charge upon the real estate, but an express direction and declaration that the debts, funeral expences, and charges of probate, should be paid out of the real estate, and the testator then gave his personal estate to his wife, except a leasehold estate in Stockport, which he gave to another: the heir was an infant. The court has never gone the length of saying, that in such a case the real estate is not particularly appropriated; and from that very appropriation the personal estate is exempt. Fully acquiescing in *The Duke of Lancaster v. Mayer*, I am perfectly satisfied that I am warranted in holding, that this personal estate is given to B. exempt from the payment of debts.

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v.
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Gaskill v. Hough. Real estate particularly appropriated to debts, personal estate exempt (H).

[837]

In *Brummel v. Prothero* (m) A. devised all his manors, &c. with their and every of their appurtenances, unto B., and to his heirs in trust; in the first place to pay all his just debts, and also to and for the use, intent, and purpose, that his mother and her assigns should, after his decease, receive out

Devise of real estate to pay debts, and afterwards annuity to C. Bequest of personality to D. who is appointed executor. Personal estate first liable.

(m) 3 Ves. 111.

(H) The words, according to the learned judge who decided this and the next case, were, "I will that all my just debts shall be paid out of my real estate." See post, 838. Vide also *March v. Fowke*, ante, 802, but in that case there were words of exclusion. The general rule is introduced ante, 787, note (B).

of all and every his manors, &c. an annuity or rent-charge of 120*l*.; and to and for this further use, intent, and purpose, that his four sisters of the half blood then living, and their assigns, should, from and immediately after the decease of the survivor of him and his mother during their respective natural lives, have, receive, and take, out of all and every the said manors, &c. an annuity or rent-charge of 200*l*. in equal shares and proportions, with powers of distress and entry; and as, to, for, and concerning all and every the said manors, &c. from and immediately after his decease, charged and chargeable as aforesaid, to the use of his brother D. and his issue in strict settlement, remainder to the use of his half brothers E. and F., and their issue, successively, in the same manner, remainder to the use of his said sisters, and their heirs, as tenants in common; and he directed his said brothers of the half blood, and their issue when in possession, to take the name of A.; lastly, he gave and bequeathed unto his said brother D. all his monies, goods, chattels, rights, credits, personal estate and effects, whatsoever and wheresoever, and he appointed his said brother sole executor.

The bill was filed by bond creditors, and the question was, whether the real or the personal estate should be first applied in the discharge of the debts.

Court proceeds on inference, not presumption; consequently collateral evidence inadmissible.

Master of the Rolls. I shall not determine it now; I will look at the will very carefully; but I will state the principles that will guide my determination. First, I will not look out of the will as to the state of his affairs; I shall not be guided by the consideration, whether he could or could not, under certain circumstances, have intended what might or might not have been inferred from the same will under other circumstances. Secondly, as to the irresistible inference, I do not know what is meant by that: I admit it must be such an inference, as leaves no doubt upon the mind of the person who is to decide upon it (1): it must be irresistible to my mind: it need not be

[838]

(1) In *Hartley v. Hurle*, the Master of the Rolls made the same observation. See 5 Ves. 546.

such, that no man alive can doubt it: but it must not be a case of presumption; for then we shall get into the miserable way of explaining it by evidence: it is not like the case between the executor and the next of kin, where the residue is not disposed of, which, I say, is only whether the testator did or did not, upon the whole, intend, at the time, that the executor should take it: that may be explained by evidence; this cannot; but must stand upon the will. There are, I am sure, cases upon these words, "I will that all my just debts shall be paid out of my real estate;" that, I take it, was determined to lay it upon the real estate only. There was a case of *Gaskill v. Hough* (nn), in the Exchequer, in which the words were something like these. This is a case which cannot very unfrequently have happened. I must be perfectly satisfied, before I decide that the personal estate is exempted. In *The Duke of Ancaster v. Mayer* the Lords Commissioners were satisfied; Lord Thurlow was not; and he said, nothing but absolute satisfaction should induce him to exempt the personal estate. Irresistible inference is not necessary even in the case of an heir at law. In the known case of a devise to the heir, after the death of the wife, the inference is not irresistible; if it is to a stranger, there is no inference.

"I will that debts be paid out of real estate," an exemption of personality. Semb.

On a subsequent day his Honor said, my determination in this case is directly the reverse of the last; for I am clearly of opinion it is not sufficient to exempt the personal estate from the debts. I have looked very attentively at the will, that the party should not think it a hard determination, because different from the last. There is a wide difference between the two cases. This is stripped of every circumstance, except that of a devise to a trustee for the payment of debts, and a general bequest of the personal estate to the executor. There is no one case since *French v. Chichester* (n), the first upon the subject, in which such words as these have been alone sufficient to exempt the personal estate. It has been over and over again decided, that such words are not sufficient to

Devise to trustees for debts, and general bequest of personality to executor, never held an exemption of personal fund (oo).

(nn) [S. C. cited ante, page 836, in the text.—Ed.]

(oo) [See ante, page 824.—Ed.]

(n) Ante, page 792.

raise such a demonstration as Lord Thurlow says is necessary (K).

(K) The following are the subsequent decisions on the points previously discussed in this chapter. They are arranged according to the simple division of the learned author, namely, 1st, Those which furnish an inference, that the owner of both funds did not mean to exempt the personal estate, and 2d, those, where from the construction of the whole will it appears he had such intention.

Devise for payment of debts, however anxiously worded, is not of itself sufficient to exonerate personal estate.

I. Under the first class may be placed the case of *Tait v. Northwick*, 4 Ves. 816. The testator in this case devised his real estate to four trustees upon trust by absolute sale or mortgage thereof, or of any part thereof, or by sale of timber thereon, or by such other ways and means as to them the said trustees should seem proper, to raise such sums of money as should be requisite to pay the several sums of money borrowed of Sir W. Pulteney, and all such other debts as the testator should at the time of his death owe to any person or persons whomsoever by mortgage, bond, or other specialty, or by simple contract, or otherwise howsoever, and all interest thereof. And after disposing of the surplus of his real estates after payment of his debts, and giving some legacies, the testator bequeathed all the rest and residue of his "personal estate whatsoever and wheresoever, and of whatsoever nature or kind soever," to his two sisters equally, for their own use absolutely; and he appointed two of the said trustees executors. The cause coming on for farther directions, a question arose, whether under this will the testator's personal estate was exempted from the payment of his debts? For the residuary legatees it was contended, that the will shewed an evident intention in their favor, particularly from the testator's very anxious directions as to the debts, before he proceeded to the disposition of his personal estate; and it was asked, whether there was any fair ground for doubting of the intention? It was true the testator had not given any direction for the payment of the funeral expences out of his real estate; but that was a slight circumstance, and those cases which required that circumstance, must have afforded but little evidence of intention. Upon this will the inference was strong. The minute circumstance of the probate and the funeral expences, did not occur to the testator when he was considering the large debts, for the discharge of which he had been so anxious to provide; and what was meant by the word "absolutely," but "discharged from the debts." The Lord Chancellor, however, inquired whether, as the trustees had no power to throw the funeral expences and probate on the real estate, the personal estate could be charged with those expences, and not be charged with the debts. And on a future day his Lordship said, he did not think there had been any case so near the argument contended for on the part of the two sisters, as *Burton v. Knowlton*. He held a firm opinion that the doctrine was exactly as laid down in *Ancaster v. Mayer*, and took the rule at present to be, that the personal estate was the natural fund; that against the charges naturally thrown upon the personal estate, it was permitted to shew a distinct exemption, or from the whole will it might

A real estate descended, shall exonerate a real estate incum- *Descended es-*
tates liable to

be collected, that there was an intention expressed in the will, not merely in *totidem verbis*, that the personal estate should be exempt. Then charging the real estate over so anxiously for payment of debts, would not of itself be sufficient to exempt the personal estate. The whole doctrine would be set adrift if the argument for the two sisters were allowed to prevail, for it only came to this. There are two circumstances; one, that there is a gift of residue of the personal estate; the other, that there is a very anxious charge of debts upon the real estate. Beyond that there was no ground to stand upon. All the rest of the circumstances were merely conjectural, upon a supposed intention; and it was asked in argument, what could the testator mean by giving these sisters his personal estate [absolutely] if they obtained nothing by it? All his Lordship could say to that was, that a man giving the residue of his personal estate, did not in general mean much. It was as it might happen. The decree accordingly was, that the personal estate should not be exempt from the payment of debts.

The next case is that of *Hartley v. Hurle*, 5 Ves. 540, where A. by his will directed that all his just debts, funeral and testamentary expences, should be in the first place fully paid and satisfied. He bequeathed to his wife, Ann, all his household goods, plate, linen, jewels, and china, and devised all his messuages, &c. and all his monies in the funds to trustees upon trust, out of the rents of the said estates and proceeds of his money in the funds, to pay all his just debts, funeral and testamentary expences, and the several legacies in his said will after mentioned. The testator then gave legacies and annuities, and directed his trustees to pay the residue of the said rents, issues, and profits, dividends, interest, and proceeds, into the proper hands of his daughter till his grand-daughter attained twenty-one, then he gave 300*l.* a year to his daughter for life, and devised the said messuages, interest monies, and proceeds upon trust, for the benefit of his said grand-daughter; "all the rest and residue of his real and personal estate, whatsoever and wheresoever, and of what nature, kind, or quality, soever the same might be, not by him otherwise given and disposed of," he gave unto his said daughter, her heirs, executors, administrators, and assigns, absolutely for ever, and appointed the said trustee, and his daughter executors. The will having been established, and the cause coming on for further directions, the principal question was, whether the personal estate was exempt from the debts? Lord Alvanley, M. R. said, the effect of the will was, that after a general direction that the debts and funeral and testamentary expences should be paid, which he considered as a direction to the executors to pay them, the testator gave certain parts of his personal estate to his wife. He then created a fund, which he vested, in two trustees, who were two of his executors, for the purpose of doing what he had in the outset directed to be done, [namely,] to pay his debts and funeral and testamentary expences, and not only those, but likewise his legacies. The legacies, therefore, were without all doubt charged only on this fund.

Direction to pay debts and devise to trustees of real and personal estate in trust, to pay debts, legacies, and funeral expences, and benefit of residue to A., no exemption of residue from debts.

"The fund thus created," continued his Lordship, "consisted of the testator's real estate, and a part of his personal estate. It was contended, that this is a specific gift of the personal estate undisposed of to the testator's daughter, *Continuation of judgment in Hartley v. Hurle.*

exonerate devised estates

bered. This is a question as to marshalling assets (*pp*), and

(*pp*) [Respecting which, see the note at the end of this chapter, sec. I. —Ed.]

exempt from the payment of his debts. Whatever might have been my opinion before the case of *Tait v. Northwick*, I must now be extremely cautious before I proceed to decide upon this point beyond the case of *Burton v. Knowlton*, for it is extremely clear the noble Lord who decided *Tait v. Northwick* intimated a strong doubt, of the propriety of my determination. I have had occasion, and have taken great pains, to consider that case very fully; and I think, if I was to decide it again, I should still be of the same opinion. The residuary clause in this will is not a specific gift at all, except with reference to what is before given. It is not merely personal estate, but the rest and residue of the testator's real and personal estate not otherwise given; whereas he had given all his real estate before in trust for the payment of his debts; and I must admit, his funeral and testamentary expences are included. It is impossible to suppose it any thing more than a gift of what was not before given, not as a specific bequest, but of what might have been omitted; not to the separate use of his daughter, but to her generally. I find no case, in which the testator, after beginning with a direction for the payment of debts and funeral expences, (which naturally fall upon the personal estate, and are to be paid by the executors,) has created a fund for his debts and funeral expences, and then given the residue by such words, (for it is not given to the separate use of his daughter) where it has been held, that he meant that trust fund as any thing more than auxiliary, if the personal estate should be deficient; and with that impression I am not at liberty to decide in favor of the residuary legatee as to the exemption of the subject of that residuary disposition; which I consider as only general words thrown in, perhaps without any definite intention. Therefore with some reluctance, but bound down by the authorities, I decide that there is not sufficient in this residuary disposition to exempt it from the payment of debts." The next evening the Master of the Rolls observed, that the subject of the residuary clause was not specifically the residue of the personal estate not by the testator otherwise given and disposed of; and the testator had made all his real estate a fund for the debts; therefore it was the residue of the very fund, which he had created for his debts.

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Devise in trust to sell and pay debts. Bequest of plate as heir-looms, and other legacies. Desire that latter legacies (except heir-looms) be paid out of personal estate.

In *Bridges v. Phillips*, 6 Ves. 567. B. by his will devised estates to trustees in trust to sell, with power in the mean time to pay off the mortgage then affecting the same; and for that purpose to take up money; and confine or restrain such new mortgage to such parts of the premises which were not intended to be disposed of; and which would be very ample to answer both purposes; and with the money arising from such sale, in the first place to pay off all his just debts, except the said mortgage, and a charge of 4000*l.* to his sisters, which by his settlement was provided for and directed to be paid out of another fund, and in the next place to raise and pay, &c. The testator then went on to dispose of the residue of the money arising from the sale, and also of that portion of his estates which should remain unsold for

generally resolves itself into a question of intention, either express or implied.

encumbered, on deficiency of personal assets.

the purposes aforesaid. He then devised plate, books, and furniture as heir-looms, and bequeathed several legacies, concluding his will thus: "All which said last-mentioned legacies I desire may be paid out of my personal estate (except that part given as aforesaid for heir-looms); and all the rest and residue of my said personal estate (except as aforesaid) I give and bequeath to my said dear wife, whom, together with the said trustees, I appoint executrix and executors of this my will." Upon an issue directed *devisavit vel non*, the will was established. The cause coming on, on the equity reserved, the only question was, whether the personal estate was exempt from the debts. In favor of that construction of the will it was contended, that it was the case of a devise of particular, excepted estates, not by way of charge, but to be sold and absolutely disposed of; that simple-contract debts were in this respect legacies; a bounty to the creditors; who had not before the means of coming at the real estate; that the bequest to the wife was as residuary legatee, and not as executrix; that the words "except as aforesaid" in the residuary disposition were material; shewing that the residue intended was the residue, subject only to a deduction in respect of the legacies given out of the personal estate, affording also an irresistible inference, that the personal estate was to go to her, subject to no other charge; and that the debts were to go out of the real estate. *Ex per* Master of the Rolls. There is certainly room for conjecture that this testator did mean to throw the whole of the debts upon the real estate. But it is only a probable conjecture; there is no certainty, no clear, unambiguous intention to be collected from the whole will, that he meant *that*; and there is no distinct difference between this case and *Tait v. Northwick*. Very small differences might be pointed out; but such as would form no guide for other cases; and leading to puzzle and confuse, rather than to give assistance to those who might be called upon to advise as to the construction or frame of wills.

Gift of residue of personalty (except as aforesaid) to wife, no exoneration of personal fund.

His Honor continued:—"There is in this, as in many cases, a very different provision for the payment of all the testator's debts by the sale of real estates. There is no provision for the payment of the funeral expences, I think, the omission of that has had full as much weight in some of the late cases as is due to it. Perhaps it is true, as stated by Lord Hardwicke, that it is more a phrase of form, than indicating a settled intention; and that either the insertion or omission of it means little. This testator then proceeds to give particular legacies out of the real estate; and it is said, to be clear those legacies must come out of that and no other fund; true; for they have no existence but by the will, and must come out of the fund the testator points out. But the debts have a separate and independent existence. The testator disposes of some part of his personal estate as heir-looms; and gives certain legacies, directed to be paid out of the personal estate. It is said, *that* shews, the debts are to be paid out of the real estate. The intention appears with no degree of certainty. He might have meant only to distinguish those legacies from the other legacies to be paid out of the real estate. No clear intention appears to make a distinction between debts and legacies; and that the latter only shall come out

Inference from direction to pay funeral expences means little. Semb.

Debts and legacies distinguished.

The first case we meet with of this kind is that of *Gallon v. Hancock* (o). There the defendant's late husband, being

(o) 2 Atk. 424, vide S. C. Ridgw. Rep. 301.

of the personal estate. It is said the words 'except as aforesaid,' refer to those few legacies immediately before given. That, is clear misconstruction. They refer to what is immediately before mentioned, viz. what is excepted for heir-looms. In *Tait v. Lord Northwick* there was more room for arguing, that the residuary clause had reference to the two legacies immediately before given; but it was held to mean the general residue; that it must be taken as such; and must be subject to every thing naturally a charge upon the fund, of which it is the residue, though the testator does not distinctly enumerate every thing payable out of it. The residuary legatee cannot take the fund except after discharging every thing payable out of it. Upon the whole of this will there is no indication plain of an intention to exonerate the personal estate from the omission to provide for the funeral expences. I rather conjecture, that the testator did intend, that the real estate he had set apart should be devoted to the payment of his debts. I could not be certain, that I might not be mistaken even in privately supposing that, but there is no ground, upon which I can judicially collect a settled intention."

Will directs simple-contract debts to be paid out of personally, and orders devisees, in paying bonds and mortgages, to contribute proportionably. Codicil empowers trustee to mortgage real estates for payment of all debts and legacies. Personal fund not exempt from debts.

The next case also, is one wherein the personal estate was held not to be exempt from the payment of debts, and must therefore be classed under this division of the note. The testator devised his real estates to several persons for their lives, with remainders in strict settlement. He then bequeathed legacies, and gave his personal estate to W. M., he paying thereout all and singular legacies, and all the testator's funeral expences and simple-contract debts. The testator then recited that he had borrowed several sums of money on mortgage to pay for the above estates, and that he was minded that the whole should be discharged in equal proportions by the respective devisees, for which purpose he ordered that all such sums as the said devisees for life should respectively pay off, should be a debt and charge against the whole of such estates in favor of the person or persons, his and their executors, &c. so paying off and discharging the same, and he directed the next taker of the said estates under his will, to repay such sums of money as his predecessors from time to time should have so paid off and expended, to such person or persons, and in such manner as his predecessor should direct, deducting from time to time the due share or proportion of such preceding taker, until the whole of such sum or sums of money should be paid off; and the testator directed the same course to be used by each of the takers in succession, until the full payment of the said mortgages; it being his will that no part of his estates should be sold. W. M. was appointed executor. By a codicil, the testator substituted the defendant as a trustee, in the place and stead of the trustee appointed by his will, and declared that the said defendant and his heirs, should and might, in order to raise money for the payment of all and singular his debts and legacies with all convenient speed, mortgage (with the approbation of the taker for the time being of the said estates, according to the said will) a competent part of his said freehold estates for so much money as should be necessary for that purpose. W. M.

seised in fee of an estate, and having borrowed a sum of money, gave a bond for it, dated May 12, 1724, and a mort-

to whom the personal estate was bequeathed by the will, insisted that the testator having by the codicil totally varied the order of funds for the payment of his debts, not having there distinguished between his simple contract and mortgage debts as he had done in his will, but had given power to the defendant, who was not executor, to raise by mortgage of the freehold estates so much as should be necessary for the payment of *all* his debts and legacies; he had exhibited an evident intention to throw the whole burthen of debts on his freehold property, and to exempt the personal fund.

The Master of the Rolls said, there was no reason whatever, either of justice or convenience, to induce him to depart from the rule laid down by Lord Thurlow, in *Ancaster v. Mayer*; requiring, that in order to exonerate the personal estate, there should be either express words, or a plain indication of that intention. Indeed, his Honor wished the rule had been still more strict; and that nothing but express words had been permitted to alter the course and order of the law. Originally the rule was so. Lord Nottingham, in *Poplam v. Bamfield*, had expressed himself thus: "The law charges the debts upon the personal estate; and *nothing* can discharge it but exclusive and expressly negative words, whether in the case of *hæres factus* or *hæres natus*." However, after the cases that had been decided, it was too late then to say it was not open to the court to collect from the whole will an intention to exonerate the personal estate: though that intention was not expressed by any positive and exclusive words. In the case before the court, his Honor thought there was not that plain indication of intention, which Lord Thurlow's rule required. By directing that the executor to whom all the personal estate was given should pay thereout all the legacies, funeral expences, and simple-contract debts, *primâ facie* there was some appearance of an intention that the testator did not mean the personal estate to be liable to debts by specialty. But that alone upon the authorities was not sufficient. There must be a charge clearly and distinctly upon the real estate, to make it liable. The testator had not in direct terms made any charge upon the real estate, but he took it for granted, that the real estate would be called upon for bond-debts and mortgages, and his object was, to secure an equal distribution of the burthen among the several devisees, who were to take the real estate in succession; and no other object whatsoever. His intention was not to favor the executor taking the personal estate against those taking the real estate; but to take care, that those who were to take the real estate, as against each other, should bear the burthen in equal proportions.

The testator directed, not, that all the specialty debts and mortgages should be paid out of the real estate, but that such sums as any of the devisees should pay should be a charge against the whole real estate, and this, the Master of the Rolls said, was the whole intention apparent on the will. Then it was contended, that the codicil operated as a real exoneration both from the debts and legacies. The codicil contained as complete a provision for all debts and legacies as could be; the trustee had power to mortgage for their payment. But this was nothing more than was the case in *Tait v. Northwick*.

Judgment.

[843]

There must be clear and distinct charge on real estate to make it liable.

Direction which could only be made under idea, that debts were to come out of real estate, not enough to exempt personal fund.

gage for the same sum, on the 13th of June following; and on

This case was hardly so strong in that respect, for there were more circumstances in that case, from which it might have been argued, that the testator could not have had in contemplation to burthen his real estate, merely in aid of the personal. At most, this was but the same case, and could not be contended for higher than as equivalent to that; and there Lord Rosslyn, adhering to Lord Thurlow's rule, said expressly, that the most anxious provision for payment of debts out of the real estate would not be sufficient to exonerate the personal estate. Sir W. Grant was therefore of opinion, that there was no exoneration of the personal fund in this will before him. *Watson v. Brickwood*, 9 Ves. 447.

Trustees expressly empowered to raise debts and legacies by selling timber, selling estate, or otherwise, as they should think fit, no exemption of personal fund.

Neither a charge, nor a direction to sell, nor the creation of a term for payment of debts, will exempt the personal estate from that burthen. The will which gave rise to the decision, or rather the confirmation of the law in those particulars, was this:—C. T. devised his freehold manors, &c. subject to such mortgages and incumbrances as then were, or at the time of his decease might be affecting the same, and to the payments of his debts and legacies thereafter given to the defendant for 1000 years; and subject thereto, he gave the said manors to his eldest son for life, with remainders in strict settlement. The will then declared, that the said term was so limited to the said trustees upon trust, in the first place, to raise the sum of 1000*l.* for his eldest daughter; and upon further trust to sell such part of his freehold as they should think proper, in order to pay off and discharge all mortgages and incumbrances, if any, of his said estates, and all his debts and legacies, and particularly what should be due to his wife for any arrears of the annuity given to her by the testator's uncle's will. The will concluded by a bequest of furniture to the testator's wife, and gave all the rest and residue of his personal estate of what nature or kind soever, unto such one of his sons as should at the time of his decease happen to be his eldest son, and entitled to the possession of his freehold estates devised by the will, and appointed the testator's wife, the trustees, and the plaintiff, (who was the testator's eldest son at the time of his death) executors. By a codicil, the testator empowered the trustees to sell timber or other trees, growing on any of his estates, (except in Weald Park) for or towards raising money to pay off and discharge the mortgages and other incumbrances, affecting any of his estates, and also his debts and legacies; and he willed, that his said trustees should raise such money either by the ways and means directed by his will, or by sale of timber, or by all of any of such ways or means as to them should seem meet. There was also another codicil, but the same was irrelevant to the question in dispute. The bill prayed that a sufficient sum might be raised by sale of the real estate, or of the timber thereon, to pay the debts and legacies, according to the will, to be applied in the exoneration of the personal estate. *Sed per* Sir William Grant, M. R.:—

[844]

Neither charge nor direction to sell, nor creation of term for debts, will

The personal estate, being the proper and primary fund for the payment of debts and legacies, can be exempted only by express declaration, or plain and unequivocal manifestation of intention. The question generally is, whether there is sufficient evidence of such intention. It is agreed, that neither

the 11th December, 1728, made his will, by which he devised

a charge upon the land, nor a direction to sell, nor the creation of a term for payment, will exempt the personal estate. There is in this will a charge of debts and legacies; and a term created for payment of them; but there is nothing particular in the manner of making that charge; or the mode, in which the trusts of the term is declared; nothing, denoting, that the testator intended the land to be the primary, still less the exclusive, fund. Then, it is contended, that the interference might arise from the manner of giving the personal estate: but there is nothing except the common residuary clause: "all the rest and residue of my personal estate of what nature or kind soever;" not, "all my personal estate," not "all, which I have hereinbefore disposed of;" or any other of those forms, which in several cases have been held to denote an intention to give the personal estate as a specific bequest. Indeed, here, the residuary legatee could not take specifically what might be left, after separating from the personal estate the particular articles given to the widow; as it is admitted, that there is a charge of uncertain amount, which must necessarily fall upon it: viz. the funeral and testamentary expences; affording the inference, that he did not intend to give his personal estate as a specific bequest. Upon the general scope of the will there is nothing leading me to suppose, the testator meant to increase his personal estate at the expence of his real: on the contrary, there is a direction that any sums he may be entitled to as personal estate, charged upon real, shall be extinguished for the benefit of the person, entitled to the real. The personal estate is not given to any one by name, but it is to such son as shall be the eldest at his decease; and who in that character, he supposed, would be entitled to the real estate. The very circumstance, that the residuary legatee is first taker of the real estate, has been sometimes held a ground for exempting the personal estate. However, it is enough to say there is not upon this will sufficient evidence of the testator's intention to exempt it. *Tower v. Lord Rous*, 18 Ves. 132.

In *Aldridge v. Lord Wallscourt*, 1 Ball & Bea. 312, Joseph Blake devised all his lands (subject to the payment of his just debts, funeral expences, and several portions afterwards charged for his daughter) to trustees, upon certain trusts; and after limiting estates in the lands to several persons, he directed the trustees, within a reasonable time after his decease, by sale or mortgage, or out of the rents and profits of the lands, to raise 3000*l.* for his daughter, Lady Errol, 4000*l.* for his daughter A. M. Blake, and 4000*l.* for his daughter H. L. Blake, he appointed his son, T. H. Blake, his executor, and bequeathed him all his personal estate, in trust for such purposes as he (the testator) should appoint. By a codicil, the testator, after reciting the bequest he had made of his personal estate, directed his executor to hold the said personal estate, in trust for the testator's daughter, A. M. Blake. The executor applied the personal estate in part payment of the testator's debts; and one question was, whether that was a right application of the personal fund, which, it was contended, he held in trust for A. M. Blake? Lord Manners, after stating that he collected three propositions from the decided cases, namely, 1st, That the intention of the testator must appear from the will itself, *Personal estate bequeathed in trust for testator's daughter, primary fund for payment of debts charged by the will on real estate, there being neither words nor apparent intention to exempt it.*

the estate in fee, which he had thus mortgaged, and also an estate for three lives, to the defendant his wife, and made

and not from extrinsic circumstances; 2d, That the personal estate being the fund primarily liable to debts, the intention of the testator to exonerate it must clearly appear; and, 3d, That neither a mere charge of debts on the real estate, or a mere gift of the personal estate, was of itself sufficient to discharge the personal estate as the primary fund;—inquired if, in the case before him, there was any thing more, than a charge on the real estate? In the beginning of the will, the testator charged the real estate with the payment of his debts, and at the conclusion, he bequeathed his personal estate to his son, in trust for his daughter, for whom, in a former part of the will, he had made a provision. But, in order to exonerate the personal estate, it was requisite something more should appear, as it was admitted, that the mere charging the real estate only made it ancillary to the personal, in payment of debts. There was a provision for other parts of the testator's family, which tended to confirm this opinion, namely, where he directed his trustees, by sale or mortgage of his estates, to raise the portions of his daughters; for it was remarkable that he made no such provision for the payment of his debts and legacies, and the personal estate was given to a daughter, who was, in another part of the will, provided for. Considering, then, the rules which had governed decisions on this subject, Lord Manners thought that this was one of the slightest cases that had ever come before the Court; it was nothing more than a charge, and if he were to hold that the personal estate was exonerated from the debts, he should decide contrary to the rule laid down by Lord Thurlow, in *Ancaster v. Mayer*, which had been so fully established by all the subsequent decisions. Adhering, therefore, to those rules, his Lordship was of opinion, that in the case before him, the personal estate was the primary fund to discharge the debts.

Real estate to be sold, and out of proceeds, debts to be paid, as also legacies, and surplus to A. Appointments of trustees executors, but no bequest of personal estate, latter fund first applicable

In another case, M. B. widow, by her will devised her lands of Ballykeel to the defendants, and ordered them, immediately after her decease, to sell the said lands to the best advantage, the money arising from such sale to be applied in the manner thereafter mentioned. The will then proceeded thus:—“In the first place, I desire that my funeral expences, and the debts which owe at the time of my death, may be paid out of such purchase-money. Secondly, I order and direct, that the sum of —, (then followed bequests of several small sums to different persons), who were all creditors of my late husband, be paid them by my said trustees and executors, without interest.” Then followed pecuniary legacies to M'Clelland and Orr, who were relations of the testatrix; and to her executors 20*l.* each, in compensation for their trouble; adding “the said several sums to be paid by my said executors and trustees, out of the money arising from the sale of my said lands, which I do order to be sold with all convenient speed after my decease; and such of the said purchase-money as shall remain, after paying the said legacies and the execution of this my will, I bequeath in the following manner,” (which the will then proceeded to dispose of.) M. B. died possessed of some personal property, which the above will did not embrace. The bill was filed by her next of kin, suggesting that the intention was to turn the real estate into personal, and to exonerate the

her sole executrix. In 1734 the testator purchased one moiety of the reversion in fee of the *life-hold estate*, and the other

personal from all debts, legacies, and funeral expences. *Sed per Lord Redesdale, C.*—"Except *Webb v. Jones*, there is not, I apprehend, a single case in which it has been held, that personal estate is exempt from payment of debts and funeral expences, without express words for the purpose, except where personal estate has been given as a specific legacy; for if it is given in terms which do not imply that it was intended as a specific legacy, it is not held to be exempt from the charges which the law imposes on it. Many cases have gone upon nice distinctions of the word "residue," whether it meant residue, after answering the payment of debts and legacies, or residue, after taking out of the fund certain specific parts. But every specific legacy is exempt from payment of debts, if there be a sufficient fund of any kind liable to the debt; for instance, if part of the personal estate be given as a specific legacy, and the real estate is left to descend to the heir, the personal estate not specifically given is first applied; but the specific legatee is entitled to have the debts which bind the heir satisfied out of the real estate, as far as it will extend. Therefore, the ground of all the cases, except *Webb v. Jones*, has been, that the terms of the disposition contained in the will were either express, or such as to raise a presumption that the testator meant to make the personal estate the subject of a specific bequest, and therefore not liable to debts because specifically given as a legacy. Except that case, I know of none where the personal estate, not given as a specific legacy, has been held exempt from the charges which the law imposes on it, without express words denoting the intent.

Specific bequest of residue.

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"The difference between a direction to sell real estate out and out (either disposing of the residue, or leaving it to go to the heir), and charging it, has, I take it, been long exploded as to its effect in exempting the personality. [See a similar observation, 2 Ball & Bea. 527.] If I devise an estate to be sold to pay debts, and then the surplus to A. B., A. B. has a right to prevent the sale, paying the debts for which it is to be sold; and therefore it is as much a devise to A. B. as if given to A. B. subject to these charges, and in effect, nothing more than a charge. But if a disposition is made of real estate, demonstrative of an intent that it shall change its nature, and be made personal, and follow the fate of the personal estate, a different construction may be given, because the testator has shown an intention that the whole should go together, and should go as personal. I mentioned during the argument, the case of *Darours v. Motteux*, 1 Ves. 390, as a case of that description, where the testator gave his real estate, and then his personal estate, to trustees; and the terms in which he made these dispositions induced the construction that he meant to blend the money arising from the sale of his real estate with his personality, and to make the whole one fund, and dispose of it accordingly. Looking into this will, I see dispositions in it, which, it may be contended, are to be satisfied only out of the real estate, such as the directions to pay certain sums to the creditors of the late husband of the testatrix. These are charges made by this lady, which, in their nature, as debts, could not affect her personal estate in any degree whatever; they are sums for

Distinction between direction to sell and charge for debts exploded.

If money arising from sale of realty be blended with personally, it is one fund, and alike applicable to debts.

moiety in 1737, and died soon after without making any alteration in his will.

which I apprehend she was not in the nature of a debtor, and her disposition in favor of the creditors is a legacy to them. The duty of the defendants, as executors, is to pay the testatrix's debts, her funeral expences, and probate of the will, out of the personal estate, the receipt of which charges them as debtors to the creditors of the testatrix.—Are they to reimburse themselves these sums [namely, the funeral and probate expences] out of the money to be raised by sale of the real estate? I do not think there are sufficient words to raise an implication of intent to exempt the personalty from these charges. On the whole, it is impossible to raise a presumption in favor of the next of kin. There seems no purpose for constituting these persons executors, except *that of collecting the personalty, and applying it in execution of the will.* The personal estate must therefore be a fund in the hands of the executors, applicable to the payment of the funeral expences, debts, and legacies." *M'Clelland v. Shaw*, 2 Sch. & Lef. 538.

II. Under the second division of this note, may be ranked the case of *Boott v. Blundell*, 1 Meriv. 193, S. C. 18 Ves. 494, though with reference to principle it may perhaps be more appropriately classed under the first. The Noble Lord who decided the case went fully into the subject and with great clearness and precision examined the principal authorities. The length of his elaborate judgment, and the general importance of the doctrine, will, it is presumed, form the best apology (if any be needed) for the detailed statement of the merits of the case, which it is deemed essential to insert here; and when it is remembered, that the original report, as admirably supplied by Mr. Merivale, occupies nearly fifty pages, the extent of this compressed epitome will not excite surprise.

Devise to trustees for 500 years in trust to pay debts and legacies. Bequest of residue of personal estate to son, who was tenant for life of other lands, not a case of exoneration.

H. B. made his will, from which the following are extracts, numbered merely for the sake of reference:—First, I direct my funeral expences to be paid; 2d. I give to my son Charles, and my daughters Catherine and Elizabeth the sum of 3000*l.* each; 3d. I direct that my *said* funeral expences and legacies be paid out of such monies as I may have by me at the time of my decease, either at Ince or in the Liverpool Bank; 4th. I give the surplus to arise therefrom, after payment of the *said* funeral expences and legacies unto my *said* son and daughters share and share alike; 5th. I devise my manors at Lockstock (to trustees) for the term of 500 years, in trust, out of the rents and profits to pay my debts, and also all such annuities or legacies as are hereinafter mentioned, or which I may hereafter specify in any codicil under my hand; 6th. I give, &c. (here the testator gave legacies to his grand-children); 7th. I give to each of my *said* trustees 300*l.* for their trouble; 8th. I give to the several persons hereinafter mentioned the several annuities hereinafter contained, that is to say (here several annuities were specified); 9th. And it is my will that my *said* trustees and executors shall not be answerable for any losses that may happen in the execution of this my will; and that if they shall sustain any expences in respect thereof, the same shall stand charged on my aforesaid manors, &c. and be paid out of the rents and profits thereof; 10th. It is also my will, that, as soon as all the trusts of the *said* term of 500 years shall have been satisfied.

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A bill was brought by the heir at law (*p*), to have the deeds

(*p*) *Gallen v. Hancock*, 2 Atk. 424, vide *S. C. Ridgw. Rep.* 301.

the remainder of the said term shall cease: and, after the determination of the said term, and subject thereto, I give the said manor, &c. to my daughter Catherine, for life (with remainders to her sons and daughters in strict settlement); 11th. And it is my will, that as soon as my debts and the legacies hereby given are satisfied, the person who shall at that time be next entitled to the said estates, by virtue of this my will, shall be let into possession thereof; 12th. And in case of the death of any of my said trustees, I direct the survivors to nominate any other person to act with them, and that such new trustee shall be allowed out of the rents and profits of the estates comprised in the said term, 300*l.* for his trouble; 13th. I devise my manor of Lydiate to my son for life (with remainders to his children in strict settlement); 14th. I direct my pictures, statutes, and marbles an Ince Hall, to be considered as heir-looms, making it my express request that no servant be permitted to take vails or donations in any shape for shewing the same; 15th. I bequeath to Mrs. A. (several articles of furniture by name); and I direct the same to be removed by my executors at the expence of my said personal estate, to such place as she may appoint; 16th. I bequeath to my said son the furniture of my said house, my wines, horses, cattle, and carriages, plate, and other my goods, chattels, and personal estate, not hereinbefore specifically disposed of, or which may hereafter be disposed of by me; and, lastly, I appoint my said trustees executors, and request them to take into their possession all my monies and papers found in my closets, and destroy such of them as they may think I wish not to be seen." By a codicil the testator recited, that it was possible attempts might be made to set aside his will; wherefore he devised his said manors, &c. at Lydiate, to his said trustees and executors for a term of 1000 years, upon trust, by sale, lease, or mortgage, or by the rents and profits thereof, to raise such sums of money as should be sufficient to pay all costs incurred by them in supporting his said will, or any devise or bequest therein.

By the first decree in this cause it was declared, that the legacies of 3000*l.* each to the son and daughters, and also the funeral expences, were specific charges on the monies at Ince; and that the surplus, if any, of those monies, was to be considered as specifically given to the son and daughters; that the furniture and residue given to the son by the 16th clause, was not a specific bequest, but that the same, forming part of the personal estate, was the primary fund for payment of the testator's debts; and that the real estates were only liable to make good the deficiency of such residue. It was now moved to vary the minutes of this decree, by declaring that the estates comprised in the said term of 500 years were liable in the first place to the payment of the testator's debts, in exoneration of his personal estate.

Lord Eldon commenced his judgment by observing, that the old rule rendered *express words* necessary to exempt the personal estate from the payment of debts. He wished that such was still the established rule of equity. But then stepped in Lord Hobart's principle, that the want of such express words

First decree that personal estate was not exempt, except as to legacies particularly charged on certain lands.

Lord Eldon's judgment.

and writings of the leasehold estate, the reversion in fee of

[848 *]
Inference must
be founded on
general context.

might be supplied by "implication plain," or "manifest intention" (Hob. 30); words which had been explained to mean "irresistible conclusion," by Lord Thurlow; and "such as would satisfy the mind of the Judge deciding upon them," by Lord Alvanley. With regard to circumstances *dehors* the will, [see also post, 885, *et seq.*] Lord Eldon thought they ought to be set aside altogether, and the question decided on an examination of the entire will. If, for instance, any particular clause were taken, that by itself might be a ground for inferring an intention to exempt the personal fund; but if viewed with the general context, it may be found to have a contrary tendency. Thus the appointment of the same person to be trustee of the real estate, and executor, had been said to show an intention not to exempt the personal estate; but if from the beginning to the end of the will an anxious discrimination between the two characters were apparent—if throughout, a most extreme caution could be traced, that all their costs sustained in the character of executors should be paid to them, not as executors, but as trustees—such an inference would fail altogether, by reason of the stronger inference of a contrary intention; so that the same expressions when used in one will, might have a totally different effect from what they would have in another.

Judgment
continued.

On a comparison of all the cases, it was scarcely possible to find any two in which the court altogether agreed with itself. The only rule deducible from all that had been said was, that since it had been laid down that express words were not necessary to exempt the personal estate, there must be in the will that which is sometimes denominated "evident demonstration;" sometimes "plain intention;" and sometimes "necessary implication;" to make out a case of exemption. But it seemed to Lord Eldon a loose way of defining these expressions to say, that the intention must be so probable that the Judge cannot suppose the contrary: he rather conceived this to be the result of the cases; that the Judge is in every instance to look at the whole of the will together, and then ask himself whether he is convinced that it was the testator's intention to exempt the personal estate. Lord Eldon however took it to be certain, that it was not enough for the testator to have charged his real estate with, or in any manner devoted it to the payment of his debts. The rule of construction was such as aimed at finding, not that the real estate was charged, but that the personal estate was discharged. In the present will there was hardly a circumstance occurring, on which there had not been a great deal of judicial comment in other cases, and from which opposite inferences had not been raised.

Late general
rule of con-
struction.

Funeral
expences.

On the 1st clause of the will before the court, Lord Eldon observed, that generally speaking, the personal estate was not only the primary fund for the payment of debts, but also for the payment of funeral expences, and of such legacies as were not made payable out of a specific fund. But, at all events, it constituted the primary fund for the payment of the funeral expences. On the 5th clause his Lordship said it should be remembered, that many of the cases turned upon an argument, that, even where legacies "thereinafter given," are made payable out of a particular fund, such gift is confined to legacies bequeathed by the will, and the general personal estate is still liable to the

Legacies.

which was purchased by the testator, *after* (pp) making his

(pp) [See post, 857, 8, in *notis.*—Ed.]

legacies given by the codicil, or by any subsequent instrument; and the testator seemed to be aware of that; expressly adding to the words "hereinbefore mentioned, or which I may hereafter specify in any codicil or instrument in writing, under my hand." Then, it was asked, could it be the meaning of this testator to delay his creditors and legatees, so as to make them obtain payment of their debts and legacies only out of the rents and profits as they should accrue? If Lord Eldon were asked this question any where but in Westminster Hall, he should answer in the affirmative—that, by *profits*, the testator meant *annual profits* only: but his Lordship understood it to be a settled rule, that where a term is created for the purpose of raising money out of the rents and profits, if the trusts of the will require that a gross sum should be raised, the expression "rents and profits" will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself by sale or mortgage, [vide as to this, *Allen v. Backhouse*, 2 Ves. & Bea. 65, ante, vol. i. 78, n.(R)]. That this testator meant his legacies to be raised and paid immediately was clear; those which were given to the infants being expressly made payable into the hands of their respective fathers. But the court would not, in order to evade the distinction, go into an inquiry whether the estates, in each particular instance were of greater or less annual value. There might indeed, in particular cases, be a great difference between debts and legacies, the latter owing their existence to the will, while the former existed independently of it. But where the testator is making a provision in the same clause, for the payment of both together, the natural inference was, that he intended both should be paid in the same way.

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Debts and legacies provided for in same clause intended to be paid in same way.

7th. The trustee were also executors, which, although generally speaking, was an argument against the intention to exempt, might, under peculiar circumstances, be in favor of that intention. Here the sums of 300*l.* a-piece which were given to them, as this will was constituted, could only be payable out of the real estate, that being the fund appropriated to their payment; and this was a circumstance worthy of particular attention. In the 9th clause the testator adverted to the double character of his "trustees and executors;" and provided for the expences which they should sustain in either capacity. The expences incurred, as trustees of the real estate, could never be a charge on the personal, unless so expressly constituted; and here the whole expences incurred in both characters were so blended, as to make it impossible to say the testator could have meant that the costs of the real estate should be paid out of the real estate, but that the costs of the personal should not be paid in the same manner. This, therefore, was a strong argument, that the testator intended the whole of the costs to be a charge on the devised estate, in exoneration of the personalty.

Legacy for trustees, who are also executors.

Expences of trustees and executors to be paid out of real estate.

14th. The particular articles of personal property enumerated in this provision, and which the testator directed should be kept together as objects of public curiosity, sufficiently accounted for their being set aside from the rest of the personal estate, given to his son, without resorting to the supposition, that it was merely to exempt them from the debts and legacies, from which it

Heirlooms.

will, and for an account of the personal estate; the heir insisting, that the estate descended was not liable to pay the

would then have followed, that the remainder was meant to be liable. On the 15th provision, it was observable, that there had not before been any mention, of personal estate, as such, in any part of the will, and if the word "*said*" was to be rejected, what was the inference? Not that because the testator had charged his personal estate with the costs of removing these specific articles, he must, therefore, have intended that it should also be liable to the payment of his debts and legacies, for that was a conclusion that by no means necessarily followed.

Of the residuary clause.

16th. With regard to the peculiar wording of the residuary clause, Lord Eldon was aware, that many of his predecessors had laid down a distinction, where the bequest was of the residue of the personal estate, and where it was of personal estate, either simply or following an enumeration of articles, of such a description as to render it improbable that the testator meant them to be applied in payment of his debts. That was a circumstance of just so much weight, and no more, in the mind of any individual judge as he could at the time, bring himself to consider it fairly entitled to. On the other hand, the residuary legatee, being made tenant for life of a part of the real estate, with remainder over to his children and their issue, this had been alleged as a reason why it could not but be intended that he should take the personal estate exonerated from the payment of debts. But this also was an argument which it was proper to look at as having more or less weight, after attending to the general effect of the will, in all its parts taken together; and after all, the question was not what the testator really meant (which could never be ascertained), but what he had authorized the court to say, it was probable, was his meaning. When Lord Eldon first read the residuary clause, it occurred to him that the words "not specifically disposed of," might be taken as excluding the idea of a specific bequest to the son, but then it being "not *heretofore* specifically disposed of," that inference was not a necessary one; it might mean as well "not specifically disposed of *to others*."

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Lord Eldon's observations on codicil.

Then came the codicil from which it had been argued, that if there were no circumstances in the will that afforded a ground for saying the personal estate should be exempt, this codicil would be a sufficient manifestation of the intention to exempt it. This, Lord Eldon doubted, but nevertheless thought, that it deserved great consideration as coupled with the provisions of the will. The effect of the codicil was such, as it was probable the testator himself did not contemplate. If connected itself with the entire will, for if any one of the numerous provisions of the will should be disputed by any person whatever, it directed, that the expences of litigation should be defrayed not out of the personal estate, which was the natural fund, but out of the real estates before devised to the son. The testator had before devoted another fund for payment of the costs of his trustees and executors, both as trustees and executors; and on looking through the precedents it was impossible, Lord Eldon said, to deny that this was a circumstance on which great stress had always been laid; namely, that where the real estate is made liable to the payment of such expences as exclusively regard the administration of the personal estate,

Inference from real estate being charged with costs relating to administration of personal estate.

mortgage, and endeavouring to throw the burthen upon the defendant to be discharged out of the personal assets, and if

such as the costs of probate and other costs sustained in the execution of the will.

"It is on these grounds," added his Lordship, "that after all the attention I have been able to give to this case, I fell convinced that the testator did not intend his personal estate to be subject to the payment of his debts. In saying this, I do not mean that it should be inferred that it is, in my opinion, impossible that other Judges, after looking through the cases with the same attention that I have done, might come to a conclusion respecting this will, the reverse of that which I have come to. On the contrary, I hold that a difference of opinion will always be unavoidable in cases of this nature, unless they were brought back to the old rule, that nothing but express words should have the effect of exempting the personal estate; yet, although with all the respect that is due to those who have gone before me, and to the results of their deliberations on the arguments suggested to their notice, I shall never be able to reconcile them so as to satisfy myself entirely with regard to the grounds on which they have built their decisions, I am able to say that in the present case, I am convinced the meaning of this will was that which I have stated it to be." *Bootle v. Blundell*, 1 Meriv. 239.

Two other cases have occurred which it will be necessary to add to this note. In the first (*Gittins v. Steele*, 1 Swanst. 28.) the noble Lord who decided the preceding case, said, "we have now reached the sound rule that for the purpose of collecting the intention, every part of the will must be considered. That rule was first established by the great judge whom we have just lost, the late Master of the Rolls, and was confirmed by myself in *Bootle v. Blundell*." Alluding, then, to the question in the case before him, his Lordship further remarked, that the personal estate could only be exempt from the payment of debts by the substitution of a sufficient fund, and it continued subject to the claims of creditors in the event of a deficiency in the fund provided. But legatees and devisees, as volunteers, were not entitled to resort to any other than the particular fund, which the testator or the law had assigned. If they were insufficient, the court, whatever might be the hardship of the case, could not supply other funds. 1 Swanst. 30.

The last case we find in the books is one recently decided in the Exchequer Chamber, before the Chief Baron sitting in equity, where Lord Wentworth by his will devised his Rowney estate to trustees in trust, to be sold, and declared that the said trustees should stand possessed of the monies to arise therefrom, and of the rents and profits in the mean time, upon the following trusts: first to pay off a sum of 2000*l.* charged on some part of the said estate, and which sum was a charge upon the Rowney estate by mortgage before it descended to the testator; 2*dly.* to pay off a sum of 20,000*l.* secured by mortgage of part of the testator's Leicestershire estate; and, 3*dly.* to pay the sum of 5000*l.* to the testator's wife, and the sum of 3000*l.* to the plaintiff Noel, and also to pay such part of such other of his just debts, and of the other pecuniary legacies by him *thereinafter* given, or which he should give or bequeath as his personal estate not *thereinafter* specifically bequeathed, should not

Conclusion of Lord Eldon's judgment in Bootle v. Blundell.

Difference of opinion on cases of intention always unavoidable.

Sound rule stated in preceding case.

Legacy fails with particular fund whereon it is charged.

Devise in trust to sell and pay certain mortgage debts, and two legacies, and also such other just debts as personal estate should not extend to pay; bequest of residue of personality, which should exceed debts not otherwise provided for, an exemption of personal

those should be deficient, out of the estate devised to her.

estate from mortgage debts.

extend to pay. And after such payments, the trustees were directed to invest the residue upon certain trusts. Then (after giving other pecuniary legacies) the testator directed that all the legacies given by him should be paid in full, without any deduction for the legacy duty. He then gave all the rest and residue of his personal estate and effects whatsoever, which should exceed the payment of his debts not otherwise provided for, legacies, funeral, and testamentary expences, to his wife; and he appointed her and his trustees executrix and executors of his will. The wife died in the testator's life-time, and the question was, whether the personal estate was exempt from the payment of debts in favor of the testator's next of kin. In the course of the argument, the Chief Baron said, that the legacy duty was a charge on the legacy, not on the estate; but if the legacy were given free of duty, it was an increase of the legacy itself, and ought therefore to be paid out of the same fund, which was provided for payment of the legacy.

Legacy free of duty.

What is an exemption in favor of residuary legatee, not so in favor of next of kin.

On the principal point his Lordship stated his opinion to be, that as there could be no doubt that the primary fund for the payment of debts and legacies was the personalty; if a testator should give his residuary personal estate to a legatee discharged by means of his real estate of debts, and that bequest should lapse, the bounty intended would be taken away, and the testator must be considered as dying intestate as to that: not that the residuary clause was expunged: for it still formed part of the will and probate, and might be resorted to, to explain the intention of the testator; but the estate was, according to the determination in *Waring v. Ward*, (see ante, note (A), p. 815) discharged from the exemption, whatever the real intention of the testator might have been. Looking at the words of the will, in the present instance, from one end of it to the other, his Lordship saw no general exoneration of the personal estate even intended; he saw none but a personal exemption, and that was gone, there being no person to take advantage of it, and therefore the testator must be considered as having died without having given his personal estate in any particular manner. With respect to those legacies which were thrown upon the real estate only, the testator declared that the Rowney estate should be applied to the discharge of the legacies "*after mentioned*," so that the legacies *before* mentioned did not seem to have been thrown upon the personal estate, but were confined to the real estate. Lord Chief Baron Richards was therefore of opinion, that the arrangement which should be made was, an application of the personal estate to pay the debts of Lord Wentworth, and then the real estate to be sold to supply any deficiency, and what remained to go to the devisee. But his Lordship could draw no distinction between a direction to sell to pay particular debts, and a charge, and whether it was to be sold out and out for the payment of the debts, or in aid only, it seemed to him to be the same thing. The decree was, that the mortgage of 30,000*l.* charged on the Leicestershire estate, being the proper debt of the testator, should be paid out of the personal estate; if that fund were insufficient, the deficiency to be supplied out of the produce of the sale of the Rowney estate; that the mortgage of 2000*l.* on the Rowney estate not being the testator's own debt, and the legacy to Noel being expressly charged on the produce of the

For the wife, it was argued, that if the personal estate was

sale of that estate, should be raised and paid out of the monies to be produced by sale thereof, and that the legacy to the wife should sink into the Rowney estate for the benefit of the devisee. *Noel v. Henley*, 7 Price, 241. This decree has since been reversed, as far as it regards the mortgage of 2000*l.*, which the House of Lords directed should be paid out of the proceeds of the Rowney estate. Dan. Rep. 332. The principles, however, delivered in the preceding part of this paragraph were not impeached, but only their application to the case in question corrected. The mortgage on the Leicestershire estate was made by the testator to secure a sum borrowed by him, for the purpose of paying off portions charged upon that estate by the marriage settlement of his father, under whose will the testator claimed. This mortgage debt therefore was not in fact the personal debt of the testator. Et vide *infra*, 867. To keep up the current of authority, it is necessary to make brief mention here of three other cases which have been decided on this doctrine :

Greene v. Greene, 4 Madd. 148. In order to exempt the personal estate from the payment of debts and funeral expences, there must be a clear intention either expressed, or to be extracted from the whole will, that the real estate is to be applied as the primary fund for those purposes. The question in this case was, whether the testator had expressed this intention? The Vice-Chancellor :—The devise of the real estate to the trustees in this case is first made, subject to the payment of his debts and funeral expences, but a charge for payment of debts and funeral expences does not necessarily import more than that the testator intended that recourse should be had to the real estate for those purposes, if the personal estate were insufficient. The testator then directs the trustees to proceed to a sale of the real estate with all convenient speed after his death ; and, out of the monies to arise by such sale, to pay and satisfy all debts due by him on mortgage bond or simple contract, and also his funeral expences, and the expences of proving his will or any codicil thereto, and after payment and satisfaction thereof to lay out the residue of the purchase monies at interest, upon government or real securities, for the benefit of his wife for life, with remainder to his children. This direction that the trustees, who form only a part of the executorship, should, out of the produce by sale of the real estate, pay all debts and expences, and after payment thereof invest the surplus for the benefit of the wife for life, with remainder to the children, when coupled with the circumstance, that the devise to the trustees is expressly made subject to the payment of debts and funeral expences, and with the gift to the wife for her own sole and absolute use of all the testator's ready money, securities for money, goods, chattels, and other personal estate and effects whatsoever which the testator should be possessed of at the time of his death, does appear to me to convey a clear intimation of intention, not that the real estate should be auxiliary only, to be applied in case the personal estate should prove deficient, but that the real estate should directly and at all events be applied as the primary fund for the payment of the debts, funeral expences, and the expences of the probate, and that the wife should take the personal estate *exempt* from those charges. His Honor then distinguished the present from the cases of *Ancestor v. Mayer*, 1 Bro. C. C. 454. *Stephenson v.*

Exemption of personally from implied intention.

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broke; and the rule of equity, before the statute, did not differ from the rule of law, unless there was some particular circumstances in the case; that the statute made no difference, as between the heir and devisee, the fraud provided for thereby, being only, such as went to defeat the creditors, and no favor was thereby intended to heirs at law. The enacting clause made wills void against such creditors, but left the law as it was before, as to heirs. Then, as in case, before the statute, there had been a general debt by bond or covenant, wherein the heir had been bound, without any mortgage to secure it, the heir must have discharged it, and could have had no contribution from the devisee; so, since the statute, satisfaction should be first made out of assets descended upon the heir at law, and if that should prove deficient, but not otherwise, then the devised estate should be liable. That there being a mortgage would make no difference; for a mortgage was a debt by specialty, and the land only regarded as a pledge or security for the money. That on the same principle, which induced the court to direct the personal estate to be applied in payment of specialty debts, in favor of the heir, it raised an equal equity in favor of a devisee, circumstanced as in the present case. By the will, the land was given to the wife, but the mortgagee might take his remedy against the devisee, or the heir, at his election; but, as in a case between the heir and the executor, the election of the creditor would not determine which ought properly to be charged, or vary the right as to the funds, so neither could determine as between the heir and the devisee; but the devisee would be entitled to stand in the place of the creditor, in this case, as the heir would to stand in the place of the creditor in the other, and to be exonerated by him for what he had disbursed. Then the court would not put the parties to this circuitry, but give the devisee the benefit directly against the heir at law (L).

(L) The principle to be collected from the whole of this case is, that lands descended must exonerate mortgaged lands devised, whenever the personalty is exempt or exhausted. Et vide post, 854 and 855, in the notes.

Though personal estate be exempted, yet if real estates be insufficient,

It may be proper to notice here a case which occurred in point of time before that of *Galton v. Hancock*, ubi supra. The case was this:—A man by his will expressly devised his real estate to trustees, for the payment of all such debts as he should owe, and also for the payment of legacies and funeral

But another point was raised in the case of *Galton v. Hancock*, between the heir and devisee, where there was a general charge of debts. And the answer of Lord Hardwicke to the argument on the effect of *such general charge* laid the foundation for farther distinctions, which have been taken up and established in subsequent cases. His Lordship considered *such general charge as affording no ulterior inference beyond that in favor of creditors.*

Descended estate must exonerate devised estate encumbered, though debts are charged generally on all testator's lands.

It was speedily discovered, that, if this conclusion of Lord Hardwicke, upon the circumstance of a general charge, was well founded, it would necessarily follow, that where a testator made such a general charge, and subject thereto, devised the whole of his estates from the heir, and afterwards acquired other estates, which he permitted to descend, the descended estates would be first liable, notwithstanding the charge; and this is also a point necessarily implied in the general point decided, in the case alluded to; for, on this ground, such charge makes no difference, as between the heir and devisee, but only improves the condition of the creditors, by giving them a particular specific fund, to which they may resort in the first instance, but it leaves the question, as to who shall ultimately bear the burthen, open; and then equity steps in, and fixes it upon the heir, as having, in relation to the testator a permission, not a positive benefit, and therefore having a weaker equity.

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For equity between heir and devisee is not altered thereby, but only condition of creditors improved.

The case of *Wride v. Clarke* turned upon this principle (u). There C. died, seised of several real estates, and possessed of

This doctrine confirmed.

(u) Cited 2 Bro. C. C. 261.

expences; then followed some pecuniary legacies and bequests of specific parts of the personal estate, and then he gave all the residue of his personal estate to his executors. Lord Hardwicke was of opinion, that this came within the rule laid down in *Adams v. Meyrick*, ante, 809, and observed, that where real estate is expressly devised for payment of debts, the personal estate is exempted [sed quære this general expression, and see ante, 784]; but if the real estate be not sufficient, the personal estate must be applied, and if there be any residue the executors are entitled to it. *Bucknell v. Page*, 2 Atk. 78. Mr. Sanders adds, "there was a mortgage upon the estate so devised, which was also decreed to be paid out of the monies arising by the sale thereof. Reg. Lib. A. 1740, fol. 264."

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continued.
former must be applied.

personal estate, having made his will, and thereby directed that all his just debts should be paid, and charged all his estate, real and personal, with the payment of the same, and subject thereto, he devised all his real estate to his wife in fee, and appointed her sole executrix. The testator purchased additional estates, between the time of making his will and his death, which descended to his heir at law. The debts of the testator exceeded the value of his personal estate, and, on a bill filed by the creditors, the question was, which estate should be first applied, the estate descended, or the estate devised? And it was decreed at the Rolls, that, after application of the personal fund, the descended estate should be applied previous to the devised estate in satisfaction of the debts.

Real estate devised (though subject to mortgage) never applied to debts, till descended and personal estate exhausted (M).

So, where T. seised in fee of considerable real estates (v), subject to a mortgage to P., made his will, and thereby, as to his worldly estate, either real or personal, after payment of his debts and funeral expences, gave and disposed thereof in manner following: He gave to his sister L. an annuity for her life, to be paid to her by the person or persons, who, for the time being, should be seised of his real estates under his will, and he also gave several pecuniary legacies, and he charged and made chargeable all his real and personal estate (except part of his personalty given as heir-looms) with the payment of his debts and legacies aforesaid; and, subject thereto, he devised all his manors of W. and V., and all his real estates in the counties of S. and M. (which were all the real estates he had at the time of making his will) to his nephew R. L. for life, on his obtaining the King's licence to bear his name and arms, remainder to his first and other sons, in strict settlement, remainder over; and he gave several articles of personal estate, to be enjoyed as heir looms by the devisees of his real estate, and as to all the rest of his personal estate, subject

(v) *Davies v. Topp*, 2 Bro. C. C. 524.

(M) So, per Lord Hardwicke, in *Palmer v. Mason*, 1 Atk. 504, where there is a specific devise of lands, the specific legatee shall never contribute, upon an average with the heir at law, towards satisfaction of creditors, while the real assets of the heir are sufficient.

to the payment of his debts, legacies, and funeral expences, he gave the same to his nephew R. L., and appointed him executor to his will. After making his will, the testator purchased a freehold estate at V. A bill was brought for an account, and an application of the personal estate in payment of debts and legacies, and in case the personal estate should not be sufficient, then to establish the will, and to have the deficiency raised by sale or mortgage of a competent part of the real state; and an account was directed, and the personal estate, not specifically bequeathed, was ordered to be applied in payment of debts, legacies, and funeral expences, in a course of administration; but in case such personal estate should not be sufficient for the payment of the testator's debts, his Honor declared that the deficiency, as to what should be remaining due to the mortgagee, and the other specialty creditors, ought to be raised by sale or mortgage of the real estate, descended to the heirs at law; and the real estates devised by the will were not directed to be applied to the payment of the testator's debts and legacies, until all the other funds were exhausted; and this decree was affirmed on appeal to the Chancellor (N).

(N) And has been followed (though not cited) in the late case of *Barnewell v. Lord Cawdor*, 3 Madd. Rep. 453. The circumstances and judgment in that case were briefly these :—The testator by his will requested that his just debts (not meaning those that might happen to be liens on any part of his real estate at the time of his decease) should be paid as soon as might be after his decease out of his personal estate, by his executrix thereinafter named, and he thereby gave and devised all his freehold and copyhold estates, &c. in England, Wales, and in the Island of Jamaica, and all other his real estate whatsoever and wheresoever situate, subject to the incumbrances which might affect the same at the time of his decease to certain persons therein named, to the use of his first and other sons successively in tail male, with remainders over; and after giving certain annuities and money legacies to several persons, he gave to his wife all his plate, goods, money, and rents, and all the rest of his personal estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever, not therein by him before disposed of, as and for her own proper goods, estate and effects for ever, subject to the payment only of such debts as he should owe as should not be liens on or secured upon any of his real estate, it being his intention that no part of his personal estate should go to exonerate his real estate, but that the same should go to his said wife, subject only to such debts [as should not be liens] on his said real estates, and to his said legacies and funeral expences; and the said testator made his

Testator exempts personally from payment of mortgages on real estate, which he devises to C. subject to incumbrances. Descended estates held first liable to discharge mortgages.

Devise to A. for 500 years, in trust to pay debts, exonerates descended estate till trust fails.

But where there was a *particular* charge for the payment of debts; as where a testator being in possession of two estates, devised one, charged with a term for that purpose, the devised estate was held to be first liable. Thus, where an estate was made subject to a five hundred years term, by the owner's will (x), for the payment of debts, and other lands descended. Lord Hardwicke held, that the estate so subjected must first be applied, before the creditors could come upon the estate descended on the heir at law: his Lordship observing, that if a testator has created a particular trust out of particular lands, and subject to that trust, devised it over, the devisee can take no benefit but of the remainder, after the whole burthen upon it discharged; and as to that the heir at law stood in a better place than the devisee did (o).

(x) *Powis v. Corbett*, alias *Corbett v. Kynaston*, 3 Atk. 556. [See ante, payment of debts.—Ed.] 788, 790, 1, for instances of parti-

wife sole executrix. The personal estate being given away, subject to the payment of all the testator's debts (except such as were liens on the real estate), and such part of the real estate upon which there were liens being devised to the defendant, it became a question whether the devised estates were liable to satisfy the incumbrances on them, or whether the descended estates were liable to discharge such incumbrances. The Vice Chancellor said, the descended estates must pay these debts, unless the testator had expressed a different intention in the will. The personal estate was the primary fund for the payment of debts, and the descended estates the second. The testator had expressly directed that his personal estate, the primary fund, should not be applied in payment of these debts, but he had no where said, that the descended estates, the secondary fund, should not be so applied. The estates charged with the mortgages were indeed devised, subject to the payment of the incumbrances upon them, but a primary fund was not exonerated merely because another fund was provided. Such other fund was considered as auxiliary only, unless the primary fund were expressly exonerated. To exonerate the descended estate, there must not only be a clear intention to subject the devised estate to the payment of the debts, but also a clear intention that the descended estate should not be subject to the payment of the debts. *Et vide Watson v. Brickwood*, 9 Ves. 447.

Primary fund not exonerated, merely because another fund is provided.

Particular estate devised for debts, whether in hands of heir or devisee, must, after personal estate, discharge mortgages.

(o) In *Buteman v. Buteman*, 1 Atk. 421, R. B. by his will, after devising copyhold lands to his wife and children, provided that if his personal estate should not pay his debts, then that his executors should raise the same out of his said copyhold premises. The testator upon his marriage, had settled some freehold lands upon his wife and children, and had covenanted that they were free from incumbrances. It happened, however, that these lands

And I presume the same inference would follow, if a person, seized of three or four estates, devised one estate *specifi-*

Estate charged with debts to be first applied in favor of heir. Semb. (P).

were subject to a prior mortgage. It was decreed, that the plaintiffs (the wife and children) were entitled to have the settled estate exonerated of the mortgage out of the personal estate and copyhold estate devised for payment of debts. See Mr. Sanders' n. (1).—So in *Lanoy v. Aithol*, 2 Atk. 444. 8 C. 9 Mod. 398, it was held, that there being a borrowing and a lending in the case of a mortgage, the real estate should be considered only as a pledge, and the personal estate should be first liable, but if the personal estate should prove deficient, then it was decreed, that the mortgages must be paid out of the freehold and copyhold estates devised by the will for payment of the debts. A decision on a similar principle appears to have been made in *Three-dale v. Coventry*, 1 Bro. C. C. 240. There Sir R. W. seised in fee of estates in C. which were mortgaged to a considerable amount, and also of an estate in the Isle of Wight, devised the latter estate to his executors as trustees for 21 years, among other uses to pay his *bond and book debts* if his personal estate should not be sufficient, and by a further clause to *pay all his debts*. This trust term, after the personal estate, was held liable to exonerate the estate at C. from the respective mortgages thereon.

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(P) Lord Eldon was of a different opinion in *Harwood v. Oglander*, 8 Ves. 125, and *Milnes v. Slater*, ib. 306. In the latter case it was held, that where a testator going beyond a mere charge, creates a particular fund for payment of his debts, that fund shall be first applied in exoneration of descended estates, whether acquired after the date of the will or not, and of the personal estate even in favor of the next of kin taking it for want of disposition. Lord Eldon on this occasion went fully into the subject of exoneration as between the heir personal representative and devisee, and in the course of his judgment remarked, that the authorities had gone this length, viz. that where the heir takes not by the intention, but in the absence of intention, the deviser is understood as having denoted in a question between the heir and the devisee, that the estate devised shall first go to the debts, though the estate so devised for payment of debts may not be legal assets, and the descended estates may be legal assets, which made it a strong operation of the court to throw the debts upon lands, which in some cases might be equitable assets, and from lands which might be legal assets.

Mere charge of debts no exoneration of descended estate; sed contra, if particular fund be created.

His Lordship further remarked, that as there must be something operating as an exoneration, either expressly or by shewing an intention to substitute some other fund, the question in the case before him resolved itself into this, whether the testator had, out of the mortgaged estates, created another fund. The words of the will were, "And I farther declare, that if at the time of my decease there shall be any mortgages or other incumbrances affecting my estates at B. and T. or any of them, the same shall not be discharged out of my personal estate, nor shall any part thereof be applied towards the same, but shall remain charged upon my said estates respectively until discharged by the several tenants for life," to whom the said estates were respectively limited. "I perfectly agree," continued Lord Eldon, "that if the testator has done no more than generally subjecting the mortgaged estates, merely leaving

Devise of mortgaged estate subject to incumbrances no exoneration of descended estate or personal fund.

cal~~y~~ for the particular purpose of paying his debts; that estate would be first applied even in favor of the heir; for these are questions of intention. Then, "what is the inference furnished by the circumstances in these cases? It is this; "Where a testator gives the whole of his estate, at the time of the devise, subject to a *general charge*, he means to give the devisee all that can be saved of his affairs, after payment of his debts. If he afterwards becomes possessed of an estate by devise or purchase, thus much is clear, by charging his estate with payment of his debts, it could not be in his contemplation to charge an estate which he actually gave in favor of an estate which he had not. In such case

them subject, as the law would, and the tenants for life and those in remainder take, subject to the incumbrance as if he had said nothing, that is not enough to protect the descended estates; but he may create such a fund by raising a particular interest in the mortgaged estate to pay the mortgage; which will have the same effect as if a particular interest was created in any other estate for that purpose. Then has he created that fund; and has he created it with reference to the descended estates, or only as to the personal estate? My opinion is, that he has created a particular fund by those words: though I do not believe he had the least comprehension what was the meaning of this part of his will. But the court cannot reject words having an obvious meaning, upon a suspicion that the testator did not know what he meant. Here is an estate given to his daughter for life, and afterwards to her children, according to her appointment, and in default of appointment in strict settlement, followed by remainders to several tenants for life in succession, and various limitations of the inheritance in tail. If the testator had died an hour after the execution of his will (and then he would have had only personal estate), he has most expressly said the personal estate should not be applied to the mortgages, and that they should remain charged until discharged by the tenants for life. There is great nicety in saying that means only till the tenants for life think proper to discharge them; that they are only to keep down the interest at most, and no farther obligation upon them was intended. If that is so, why are those words used very differently from the words "subject to the mortgage," in *Serle v. St. Eloy* [ante, 830]? At best they look to the event of payment, not by the owners of the inheritance, but by the tenants for life. The testator's meaning must be taken to be to impose upon the tenants for life the necessity of sacrificing the life estate for the exoneration of the owners of the fee. Many cases might be put, in which descended estates may be applicable, where the personal estate would not. Suppose all the tenants for life, in the present instance, dead, or did not live long enough: in one case, there would be no fund; in the other, not a sufficient fund. Then the personal estate being directed not to be applied, the descended estates must be applied to the exoneration." *Milnes v. Slater*, 8 Ves. 306.

" the estate descended cannot be stated as the object of his intention to exempt. But if a testator has two estates when he makes his will, and charges one, either generally, or by creating a term thereout, the inference is, that he means to exempt the other."

The case of *Donne v. Lewis* is another instance (y), shewing, that whether the intention was to charge the estate specially or generally; that is, whether the testator has selected any part of his estates which by his will should be first applied, or whether the charge is only to subject his estates to the payment of his debts, which otherwise perhaps could be applicable to them, is the main question on such occasions.

Generally, descended estate must exonerate devised estate, though latter charged with debts; sed contra, if devised estate be expressly pointed out in aid of another fund, provided for that purpose (a).

In that case L. made his will (x), and thereby desired, that all his just debts, funeral expences, and the charge of proving his will, might be paid as soon as convenient after his decease, and gave and bequeathed to his wife S. L. the sum of 200*l*. and also several specific parts of his personal estate. He then devised to the said S. L., and to T. L. and I. B., and to the survivor of them, and the heirs, executors, and administrators of such survivor, according to their respective estates and interests therein, all his freehold, copyhold, and leasehold estates (not thereafter particularly bequeathed), together with all his ready money and book debts, which should be due and

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(y) 2 Bro. C. C. 257.

257, et vide *Manning v. Spooner*, 3 Ves.

(z) *Donne v. Lewis*, 2 Bro. C. C. 114.

(Q) This case was said by the Master of the Rolls, in *Manning v. Spooner*, 3 Ves. 117, to have been determined on very full consideration and discussion, and on principles which have been constantly acted on ever since. Taking that case for his guide, the Master of the Rolls determined, (3 Ves. 114) that though a general charge of debts upon a devised estate will not prevent the previous application of an estate descended, yet if the devised estate be selected and appropriated to the debts, it will be liable before the estate descended: but this arrangement, his Honor said, did not bind creditors; and he further held, that it was immaterial whether the lands descended were acquired before or after the date of the will; et vide 2 Bro. C. C. 252; and *Tweeddale v. Coventry*, 1 Bro. C. C. 240, as to the latter point.

P. 858
continued.

Devised applied before descended estate, when.

Donne
v.
Lewis.

owing to him at the time of his decease, in or upon account of his several trades or employments of a builder and feather-merchant, upon trust, that they the said S. L., T. L., and I. B., &c. should collect and receive the said book debts, and sell and dispose of his freehold, copyhold, and leasehold estates, *and out of the money arising thereby, pay and discharge all his debts and legacies whatsoever* (except the debts secured by mortgage of the estates thereafter specifically bequeathed, which were to be paid and discharged by the devisees of those estates respectively); and in case the money so to be raised by his said trustees should not be sufficient to discharge the said debts and legacies, then he willed, *that the deficiency should be charged on the several estates thereafter given, or bequeathed to or for the use of his three sons and two daughters respectively, and that one-fifth part of such deficiency, with interest thereon, at five per cent. from the time of his decease, should be paid by each of his said sons and daughters.* He then proceeded to devise very fully and particularly to, or in trust for, his five children, respectively, five several estates: four of which were leasehold, the other freehold, and three of the leasehold estates were subject to mortgages or other incumbrances; but in case it should be necessary to pay off and discharge the mortgages, or other incumbrances upon any parts of his estates before the trusts thereby created, concerning such estates respectively, should be fully executed and determined, the said testator thereby empowered and directed his said trustees, and the survivor of them, &c. as the case might require, to sell and dispose of such respective estates, in the best manner they were able, and after payment of all charges, incumbrances, and expences thereon, lay out and invest the residue of the money to arise by such sale, in the purchase of government securities, in the names or name of his said trustees, or the survivor of them, or the heirs, executors, or administrators of such survivor, as the case might require, to and upon the like uses and trusts as were thereby expressed and declared of and concerning such estates respectively, or to such of the said uses and trusts as should be then existing and capable of taking effect. And the said testator gave all the rest and residue of his estates, real and personal, of what nature, kind, or quality soever,

unto and among all and every his three sons and two daughters, in equal proportions, share and share alike; and the said testator made the said S. L., T. L., and I. B., executors of his will.

*Donne
v.
Leadb.*

A bill was filed to have the trusts of the will performed, and for the necessary accounts. The Master made his report, by which it appeared, that the general personal estate, together with the trust fund, consisting of the leasehold premises, not specifically bequeathed (for in fact the testator had no copyhold estates whatsoever, and no freeholds but those specifically devised), and the ready money and book debts were not nearly sufficient to pay the debts, which amounted to upwards of 5000*l.*, besides those specifically charged on the devised estates, and that the legacies amounted to 2000*l.* It also appeared, that *the testator purchased a small freehold estate after the time of making his will*, which was worth about 300*l.*, and which therefore descended on his eldest son and heir at law.

The single question was, whether the descended estate should be applied in payment of the debts and legacies (there being specialty debts in fact much beyond the amount) in preference to the trust fund devised for that purpose, or before the specific devisees should be called upon for their contribution according to the directions of the will?

Et per Lord Thurlow (*a*), the question will always be this, and the only one that can reconcile all the cases: Are the terms of the will only a general indication, that the testator *means* to subject his property to his debts, and not to be a knave (as many of the cases treat the man who does not): or does he mean more, and to make a particular provision for the purpose? It is unnecessary to enlarge on the point of the mortgage debts, for he has provided for the payment of them in so distinct a manner, that even the case of *Serie v. St. Eloy* could never touch this case (*b*). They are clear deductions

(*a*) *Et vide Manning v. Spooner*, 3 Ves. 114.

(*b*) *Ante*, page 830.

Donne
v.
Lewis.

*Presumption
that testator
in charging A.
means to ex-
empt B. inap-
plicable to es-
tate purchased
after will.*

from the property devised. But the question arises more on the general provision for debts. There are two provisions, consisting of his ready money and book-debts, and also some leasehold estates, which very probably were an enumeration of all his personal estate not otherwise specifically disposed of; the next was a contribution from the devisees. The supposed intention to be imputed to the testator, is, that he means to exempt Whiteacre where he charges Blackacre; but this cannot be applicable to Greenacre; which he had not until afterwards. But the fallacy is, that there is no intention in fact, either as to Whiteacre or Greenacre, but only as to Blackacre; and he leaves both the others quite clear of his intention, which does not apply at all more to Greenacre than to Whiteacre, he being totally silent as to both. And you must execute his intention as to Blackacre; and if Blackacre is not sufficient, the justice of the case will be executed as to creditors, notwithstanding his intention, and only under the common principles of law. Therefore the legacies would not be charged on the descended estate directly, but it must be done, if at all, by circuitry. In this point of view then, is there, in this will, such an expression of intention, with regard to devised estates, as to affect a property which the will takes no manner of notice of, or is it a direction how, and *out of what funds*, the debts and legacies shall be paid? He *directs all the trust fund to be converted into money, and to be applied, &c.*; and he gives interest at five pounds *per cent.* on the legacies from his death, which is beyond the ordinary course of this court, and the intention usually imputed to testators. Having charged these estates *especially*, it is impossible to execute this purpose without, by consequence, exempting the estate descended. In this view, I take it to be consistent with the cases of *Davies v. Topp*, *Wride v. Clark* (c), *Corbett v. Kynaston*, *Powis v. Corbett* (d), and *Galton v. Hancock* (e), (though there was a difference in those cases as to the consequence of those principles) to say, that the trust fund must be first applied, and if that is deficient, as it appears to be, then, that the devisees must contribute in fifths, before the estate descended can be called upon.

(c) Ante, page 854, 5.

(d) Ante, page 856.

(e) Ante, page 842.

On the whole, therefore, the rule, as to the order of affecting assets in such cases, is this (*f*): First, that the general personal estate is to be applied. Secondly, ordinarily speaking, estates devised for payment of debts. Thirdly, estates descended. Fourthly, estates specifically devised, even though they are *generally* charged with the payment of debts (*R*).

Order of assets.
1. Personal estate. 2. Estate devised for debts. 3. Descended estate. 4. Devised estate.

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And if one purchase an estate subject to a mortgage, his personal estate will not be liable to exonerate the real estate from payment of the mortgage debt, although he covenanted with the vendor to pay the mortgage, and indemnify him from all costs and charges in respect of it; [for in this case the personal estate of the purchaser has not received any addition to its fund by means of the mortgage.—*Ed.*]

A. purchases estate subject to mortgage, and covenants with mortgagee to discharge same. A.'s personal estate not liable to exonerate land purchased (a).

Thus, where B. agreed to purchase an estate of A., which was then subject to a mortgage of 2000*l.* to D. (*g*), and accordingly, by indenture of lease and release, between A. of the one part, and B. of the other part, reciting the mortgage, and that B. had contracted with A. for the purchase of the inheritance of the said estate, and had agreed to pay the sum of 3500*l.* for the same in manner therein mentioned, that is to say, to the mortgagee all such sums as should be due to him upon the said mortgage, on the first day of May next ensuing, as also to pay such sum of money as should remain after deducting the money due on the mortgage to D.; it was witnessed that the said A., in consideration thereof, did grant, &c. to the said B., his heirs and assigns for ever, all the said

(*f*) Per Lord Thurlow, 2 Bro. Ch. Ca. 263.

(*g*) *Tweddell v. Tweddell*, 2 Bro. Ch. Ca. 101. 152.

(*R*) From the case of *Donne v. Lewis*, ubi supra, 858, Sir R. P. Arden, M. R., collected that there were four classes of estates to be applied in payment of debts; 1st. The general personal estate, unless exempted expressly or by plain implication; 2dly. Any estate particularly devised for the purpose, and only for the purpose of paying debts; 3dly. Estates between the expression of the rule and that of Lord Thurlow's in the text. For the more modern enumeration of the order of funds for the payment of debts, see ante, 325, note (E).

(*S*) This is good law. It was cited and approved by Sir W. Grant, M. R. in *Hancock v. Abbey*, 11 Ves. 189.

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Personal estate never charged in equity, where not at law.

premises, &c. and in the covenant against incumbrances, the mortgage and securities were exempted. And the said B. did covenant, that he, &c. would well and truly pay, or cause to be paid, to the said D., the said sum due in manner aforesaid, and would indemnify the said A., his heirs, &c. and his goods and chattels, land and tenements, from all costs and charges, &c. in respect of the said mortgage. B., after completing the purchase of A., made his will, and died [without having discharged the said sum of 2000*l.* due on the mortgage to D.], and then a question arose between his personal representatives, and the devisees of this estate under the will, whether, from the nature of the contract, the personal estate of B. (respecting which he had made no disposition in his will), was liable to be applied in discharge of the mortgage? *Et per curiam*, it is a clear rule, that the personal estate is never charged in equity where it is not at law; and if not chargeable at law, there is no principle or case in this court to warrant its being chargeable in equity, contrary to the order of the law. Where it is a debt payable by executors *at law*, this court will not relieve the heir, by turning the charge upon the executors, provided it does not interfere with other debts and legacies, or any substantial claims (*h*). In respect of the rule of marshalling assets, it is that it must be a debt affecting both the real and personal estate; so in case the personal fund proves deficient, to enable the court to marshal the assets, you must prove that the executors are accountable at law, and not in equity. In this case, the personal estate never was liable, either by action against the party himself, or against his executors (*s*) (*T*).

(*h*) Vide *Clarke v. Sampson*, 1 Ves. 100, et 2 Ves. jun. 65.

(*s*) Vide *Wood v. Huntingford*, *infra*, 879, et note distinction, [881.

See also Sir W. Grant's observations on the principal case, *infra*, p. 884, in *notis.*—*Ed.*]

A. mortgages to B., and sells equity of redemption to C., subject to mortgage. C. dies. Land, first fund for payment of mortgage.

(*T*) This case of *Tweddell v. Tweddell*, induced the decision in *Butler v. Butler*, 5 Ves. 534. In that case there was a mortgage from Brent to Bernard, for 2000*l.* Brent conveyed his equity of redemption to Butler, subject to the mortgage, to which conveyance Bernard was not a party. Butler then made his will, and directed that all his just debts and funeral charges should be paid out of his personal estate and effects, and gave to trustees and their heirs, among other hereditaments, the estate he had lately purchased of

And if money on mortgage be *not* properly the debt of the owner of the mortgaged estate, that estate alone shall bear the burthen thereof, notwithstanding that *the owner*, by his will, *charges a specific part of his property* with the payment of debts.

An incumbered estate descends to testator, who devises it, subject to mortgage, and creates term of other lands for payment of his debts. Devisee takes cum onere.

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Thus (k), where a leasehold estate [held of the manor of East and West Deeping, by lease from the Crown] had been mortgaged by the testator's father to N. for 6500*l.*, and had, subject to that mortgage, devolved upon him on the death of his father; afterwards the mortgage was assigned by the desire of the testator to H., who advanced to him a farther sum of 100*l.* upon it, and the testator conveyed other estates as an additional security to the mortgagee. The testator then made his will, and thereby devised as follows: " I give and devise to A. and B., their executors, administrators and assigns, all those my manors, lands, &c. in L., to have and to hold to them, from the time of my decease, for the term of ninety-nine

(k) *Ancaster v. Mayer*, 1 Bro. C. C. 454, [fully acquiesced in by Lord Alvanley, ante, 836, 7.—Ed.]

Mr. Brent, to the use of his eldest son G. Butler, for life, with remainder to the heirs of his body, with remainders over; he gave other freehold estates to the use of his son (T. Butler) for life, with remainders over; and all his leasehold and personal estate, after payment of his debts, as aforesaid, and legacies he gave to his executors, in trust to sell the leasehold, and after payment of his debts, legacies, and funeral charges, in moieties to his two sons. G. Butler, the son, was the acting executor. In 1789, the bill was filed by T. Butler to have the will established; and the usual decree was made. Upon the accounts it appeared, that the personal estate of G. Butler, the elder, had been applied by the executor in discharge of the mortgage to Barnard; and the question was, whether payment of that mortgage out of the personal estate of the testator could be supported. The Master of the Rolls said, he could not distinguish this case from *Tweddell v. Tweddell*. If that case and the others upon which it was determined, were out of the way, and he was called upon to decide this point for the first time, perhaps he might have been of another opinion; but he collected from those decisions, that if a man purchases an estate subject to a charge, and does no more than covenant with the vendor, that he shall be indemnified, it is not his own debt, to be paid out of his personal estate, or rather a debt of his in respect of the estate only; and if nothing more has been done to take it upon himself, the debt must be paid out of that estate and not out of his personal estate. The decree was accordingly.

Rule as to appropriation of debt on purchase of estate subject to mortgage.

years, upon the trusts herein after mentioned." He then gave the real estate subject to the term, and, in default of issue of his own body, to the plaintiff for life, remainder to his first and other sons, in strict settlement, with remainders over, and afterwards declared as follows: "I do hereby declare, that the term and estate, so as aforesaid limited to them the said A. and B., &c. is upon the special trust and confidence, and to the intents and purposes following; that is to say, upon trust, that they the said A. and B., &c. shall, out of the rents and profits, or by mortgage, assignment or demise, of all or any part of my before-mentioned manors, &c. or any of them, for all or any part of the said term of ninety-nine years, or otherwise as to their discretion shall seem meet, levy and raise so much lawful money of Great Britain as will be sufficient *to pay and satisfy all the debts I shall owe at the time of my decease*, my funeral charges, and all the legacies and sums of money given by me in and by this my will, and pay and apply the same accordingly. And my will and mind is, that after so much money shall be raised as shall answer the purposes aforesaid, together with all costs, &c. the said term shall cease and determine." He then devised as follows: "I give and devise to my brother M. B. his executors and administrators, all that the manor of East and West Deeping, holden by lease from the Crown, subject to the yearly rent and covenants reserved in the said lease, and also subject to the mortgage thereon to N. for 6500*l.*; but in case my said brother shall not be living at the time of my decease, then I give the said estate and premises, with the appurtenances, subject as aforesaid, to such person as shall be entitled to the freehold of my real estate at the time of my decease, by virtue of the aforesaid limitations of this my will." And towards the end of his will he devised as follows: "*Item*, I also give all my household goods, and all other my goods, chattels, effects, and personal estate whatsoever, unto my said brother M. B., if he shall be living at the time of my death; but in case he shall be then dead, I give and devise the same to such person as shall be entitled to the freehold of my real estate, under and by virtue of the limitations in this my will," &c. M. B. died in the life-time of the testator, and the plaintiff became entitled under the limitations in the will to the real estate. And one question was, whether

the term bequeathed by the testator for the payment of debts was liable to discharge the mortgage debt on the leasehold estate? *Et per curiam*, With respect to the leasehold estate, *the charge under which it came to the testator was prior to his purchasing it*, [or rather its devolving upon him], *and inherent in the estate*, and the estate itself was left liable to answer it, and neither the personal estate, nor real estate, ought to be charged with that debt; for when a man purchased an equity of redemption, *subject* to incumbrances, that should be a real incumbrance following the land, and *not a personal one*. And the difference between an estate descended and one purchased was nothing, unless the circumstance of purchasing created the difference, but *that* afforded no argument. The question then was, whether assigning the mortgage from N. to H. and covenanting for payment of debts, altered the case, and made it the debt of the testator? and it was clear that it did not; for although where a man transferred a mortgage, and *covenanted* for the *payment* of the debt, according to the *rule of law*, he made it his *own* debt, and made *himself* liable to be sued upon that covenant; yet the case of *Evelyn v. Evelyn*, had decided (l), that though he might be at law liable, yet while there were *real assets* sufficient for the *payment* of the incumbrance, *they* should be applied for *that purpose*; and it was to be understood, with respect to such transaction, that the party did it by way of *accommodating the charge*, and not of making the debt *his own* (w).

Effect of purchaser's covenant to pay money.

(l) *Infra*, [868, et vide S. L. 867.—Ed.]

(W) The land in these cases is considered the principal, and the covenant to pay only a collateral security; and the personal estate of the covenantor has the same equity to be reimbursed out of the land, as the land is entitled to when it is pledged as a collateral security. Butl. Co. Litt. 208. n. (1). s. 2. If a grandfather mortgages his estate, and covenants to pay the mortgage money, and the land descends to his son, who dies without paying off the mortgage, leaving a personal estate and a son; the intermediate son's personal estate shall not be applied in payment of the mortgage; for the debt was not contracted by him, and so his personal estate derived no advantage from it. *Cope v. Cope*, 2 Salk. 450. S. C. 1 Eq. Ca. Abr. 270, pl. 3. 2 Cru. Dig. 182, 2d edit. But if the father had been executor to the grandfather, and the grandfather had left assets to the value of the debt, and the father had converted those assets to his own use, there an equal portion of the father's

Covenant to pay money, only collateral security.

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Purchaser of encumbered estate on farther advance charges other lands.

Principal estate still primarily liable.

Another question in the preceding case was, whether, when the testator mortgaged an estate of *his own* as an *ulterior* security, that circumstance would create a difference? and it was held that it would not; for nothing made it his debt so effectually as the covenant to pay; for it did not create the debt, but only operated as collateral to the debt (*m*). A man mortgaged his estate without covenant, yet because the money was borrowed, the mortgagee became a simple-contract creditor, and in that case the mortgage was a collateral security; and if there were a *bond* or a *covenant*, then there was a *collateral* security to a *higher species*, but no higher by means of the mortgage merely; therefore having security amounted to nothing (*x*).

(*m*) Et vide *Hamilton v. Worley*, 2 Ves. jun. 62, [S. C. 4 Bro. C. C. 199.—*Ed.*]

personal estate would have been liable to the payment of the grandfather's debts, and the grandson could in such case have come upon the father's executors to exonerate the mortgage out of the father's personal estate. *Gilb. Lex Præc.* 315; and see *Scott v. Beucher*, 5 Madd. 96. *S. C. infra*, 951, last case in 2d section of note there. As to exoneration, when the mortgage is between tenant for life and a remainder-man, see post, 870, 1.

Without covenant or bond wherein heir is named, mortgagee has no claim of real assets of mortgagor.

(*X*) It should in this place be observed, that without a bond or covenant, in which the heir is named, the mortgagee will have no claim on the real assets of the mortgagor. Thus in a MS. case mentioned by Mr. Cruise in the 2d edition of his *Digest on the Law of Real Property*, 2d vol. p. 163, a father and son joined in a mortgage of the father's estate; the father received the money, and the son conveyed in consideration of ten shillings. There was no covenant in the mortgage deed for payment of the money. The bill was brought to make both the real and personal assets of the father and son liable to the mortgage debt. The estate mortgaged being subject to prior incumbrances, Lord Hardwicke said, it had been determined that the personal assets were liable, though there were no covenant in the deed for payment of the money, because there was a debt contracted by the borrowing [see ante, 774, 5]. This demand went a step farther, and sought to charge the real assets of the father in the hands of the son, which were not liable in the hands of the heir, even by a bond or covenant of his ancestor, unless the heir was specially named. As to the son, his assets were no way liable, for he conveyed only in consideration of ten shillings, and had no part of the money, consequently was no debtor; and neither his real nor personal assets were bound. *Lloyd v. Thursby*, MS. 1743. 2 Cru. Dig. 163. The same principle seems to have been hinted at by the Lord Chancellor in *Aldrich v. Cooper*, 8 Ves. 394, when he inquired upon what ground the court said, in given cases, that simple-contract debts should be paid out of the real estate? Not upon the ground of assets, he added, but upon this; that not every creditor having a pledge of

Again, where L. (a), being seised in fee by descent of an estate at C., and other real estates both freehold and copyhold, by his will devised the estate at C., which was subject to a mortgage for 1500*l.* contracted by his ancestor, and also another estate, to be sold; and charged the same, and also his personal estate (except 300*l.* due on bond, which was originally part of his wife's fortune, and specifically bequeathed to her by the will), with his debts and legacies, and devised the residue of his real estate in trust for his brother B. in strict settlement, subject to a charge of 100*l.* a year to his wife upon the copyhold estate; and made his wife executrix: The question was, whether, under this will, the personal estate of the testator should be applied in exoneration of the real, towards the discharge of the 1500*l.* And it was held by Lord Thurlow, that it should not; but that the same should come out of the estate originally liable to it (o). And this decree was afterwards affirmed in the House of Lords.

Estate descends on L. in fee, subject to a mortgage. He by will charges his real and personal estate with debts and legacies, mortgage to be paid out of real estate encumbered therewith.

And here we must remark, that even a personal covenant with the mortgagee, to pay mortgage money, will not make the personal assets of the covenantor liable in equity for it, where the money was originally advanced to another person, and not to the covenantor; for the Court will always take into consideration whose debt it is, and make the personal estate benefited by the loan, liable in the first instance, and not the security.

Personal assets not affected by purchaser's covenant with mortgagee to pay money.

(a) *Lawson v. Hudson*, 1 Bro. C. C. 58, [affirmed on appeal, 7 Bro. P. C. 511, folio edit. 3 ib. 424, 8vo. edit. et vide *Butler v. Butler*, 5 Ves. 534, cited ante, page 863, n. (T), where

the personal estate was also charged with debts.—*Ed.*]

(o) Vide 7 Bro. P. C. 511, [fo. ed. and 3 ib. 424, 8vo. edit.—*Ed.*]

land, but a specialty creditor had a double fund to resort to. There might be a mortgage, for instance, where the instrument in none of its parts or obligations would affect the heir; though the mortgagee had a pledge of the land it was not as assets, or as a specialty creditor, that he could touch the land; but if he had a bond, or a covenant were inserted in the deed, then he would be a specialty creditor; whose demand after the death of the mortgagor would affect the heir. A mortgage however is in general considered as in the nature of a specialty debt, see ante, 780.

Covenant on transfer of mortgage does not alter nature of debt, or liability of funds (x 2).

[868]

Thus, where Sir Edward Bagot (p), married the daughter and heir of Sir Thomas Wagstaff, and for raising part of Miss Wagstaff's portion, Sir Thomas mortgaged part of his estate for 3500*l.* and then died, leaving Lady Bagot, his daughter and heir. Lady Bagot afterwards joined with her husband, Sir Edward, in a deed and fine, whereby she settled her estate on her husband and herself, and the heirs male of the body of her husband. The mortgagee wanting his money, Sir Edward joined in an assignment of the mortgage, and covenanted that he or his wife, or one of them, would pay it. Then Sir Edward died, leaving Sir Walter his son by his wife; his lady afterwards married with the defendant Colonel Oughton, and died. And the question being, whether, by reason of the covenant from Sir Edward Bagot for the payment of this 3500*l.* mortgage money, his personal estate should be liable to pay the same? It was held, that this covenant by Sir Edward would not make his personal estate liable to go in case of the mortgaged premises; for the debt being originally Sir Thomas Wagstaff's, and continuing to be so, the covenant upon transferring was only as an additional security, for the

(p) *Bagot v. Oughton*, 1 P. Wms. see *Leman v. Newnham*, 1 Ves. 51, and 347, [S. C. ante, p. 728, n. (Y), and ante, 801.—Ed.]

(X 2) A creditor may have a right to demand a debt against the personal estate which the heir at law or devisee of the real estate may not have a right to require to be paid out of the personal estate, in exoneration of the real estate. Thus, for instance, if a real estate comes to a man, subject to a mortgage, and upon transfer of that mortgage, that person covenants for payment of the mortgage-money, that is not a debt which is to be paid out of the personalty, in exoneration of his real estate for the benefit of the heir-at-law, because the debt was not originally his own. When a grandfather makes a mortgage, and the estate comes afterwards to the son of the grandfather for life, with remainder to his first and other sons in tail, and the mortgagee calls in his money (in which case there must be a transfer of the mortgage) although the father must join in the transfer of that mortgage, and would be called upon in all probability to covenant for the payment of the money, yet as between his real estate and personalty, the real estate not having been originally his own, the court would only consider his covenant as a collateral security, and his personal estate, would not be applicable to the payment of the mortgage debt. And although a mortgage bore interest at 4 per cent. yet the additional one per cent. is not a charge upon the personalty, *Noel v. Henley*, Dom. Proc. Dan. Rep. 336.

satisfaction of the lender, and not intended to alter the nature of the debt.

It follows from this principle, that the general covenant in mortgage deeds, for quiet enjoyment, free from incumbrances without excepting incumbrances—does not discharge the land from such incumbrances, so as to throw them on the mortgagor's personal estate; it merely subjects the general assets of the mortgagor to any deficiency in the security that may be occasioned by any incumbrances whatsoever, without any supposition of discharging the *lands* from such incumbrances, but merely of indemnifying the mortgagee against them.

Covenant for quiet enjoyment free from incumbrances, no exemption of land from payment of any incumbrance.

And the law will be the same, if money be borrowed on mortgage by virtue of a power to charge an estate; for in such case, the heir takes the land *cum onere*. Therefore, where George Evelyn (*q*), the defendant's father, and grandfather to the plaintiffs, had three sons, John, George, and the defendant Edward Evelyn; George, the father (being tenant for life, remainder to his eldest son John, in tail male, of part of the premises), together with his eldest son John, on the 20th October, 1698, by deed and recovery, settled certain estates in strict settlement, with a power to George, the father, by deed or will, to charge by lease, mortgage, or otherwise, the premises limited to himself for life, with raising or paying any sum not exceeding 6000*l.*, George, the father, in pursuance of the power, mortgaged part of the said land for 1000*l.* for the term of 1000 years. This mortgage afterwards, by mesne assignments, became vested in Sir Thomas Pope Blunt, with a covenant, from George Evelyn, the son, for payment of the mortgage money, and, on the same assignment, Sir Thomas, the mortgagee, covenanted to re-assign to George Evelyn, the son. Afterwards George Evelyn, the father, died; then

Mortgage by tenant for life under power. Remainder-man must take estate cum onere; and covenant, by intervening remainder-man to pay money, immaterial (Y).

[869]

(*q*) *Evelyn v. Evelyn*, 2 P. Wms. where this case is further stated as 659. S. C. Fitzgib. 131. Sel. Ch. Ca. to other points.—Ed.]
80, [W. Kel. 19, et vide ante, p. 92,

(Y) As to exoneration, when the mortgage is made by a tenant for life and the remainder-man, see post, 870, 1, *in notis*.

*Debt fixed
where it ought
to fall.*

A court of equity will do its utmost to fix the burthen, where, *in conscience*, it ought to fall on all the circumstances of the case.

1 Turn. 231; and the bond being paid off after the death of the principal, does not appear to alter the case. *Ib.* The proper plan in these cases is, for the surety to take a counter bond from the principal, so that if the surety pays one bond he instantly becomes a specialty creditor by virtue of the other. It should be observed, that in *Copis v. Middleton*, two individuals gave a joint bond, one as principal, the other as surety, no other assurance was executed at the time, no mortgage was made to secure the debt, no counter bond was given by the principal to the surety. But if at the time a bond is given, a mortgage is also made for securing the debt, the surety, if he pays the bond, has a right to stand in the place of the mortgagee, and as the mortgagor cannot get back his estate again without a conveyance, that security remains a valid and effectual security notwithstanding the bond debt is paid; but if there is nothing but the bond, and that bond is discharged by the payment of what is due upon it, the bond is gone and cannot be again set up. Per Lord Chancellor, in *Copis v. Middleton*, ubi sup. See also *Gummon v. Stone*, 1 Ves. 339. *Waffinton v. Sparks*, 2 Ves. 569. *Robinson v. Wilson*, 2 Madd. 464. *Parsons v. Bridgock*, 2 Vern. 608. *Wright v. Morley*, 11 Ves. 12. Surety to stand in place of creditor; *Watkins v. Flanagan*, 1 Glyn & Jam. 199. *Gee, Ex parte* 1 Glyn & Jam. 330. In *Prendergast v. Devey*, 6 Madd. 124, a bill was filed by sureties to restrain an action against them upon a surety bond, and to have the bond delivered up, upon the ground that the creditors had given time to the principal debtors without the sureties' consent. The court considered that this would certainly have discharged the sureties; but that their liability did not commence until demand.

In *Mayhew v. Crickett*, 2 Swan. 191, the Lord Chancellor considered it clear, that though the creditor might have remained passive if he chose, yet if he takes the goods of the debtor in execution, and afterwards withdraws the execution, he discharges the surety both at law and in equity. But if a creditor having given time to the debtor primarily liable, makes a demand on one who is secondarily liable, and receives a promise from him, that is sufficient to sustain the demand, not as the creation of a new, but as the revival of an old debt. But his Lordship thought it a question fit to be tried at law, whether, if a party takes out execution on a bill of exchange, and afterwards waives that execution, he has not discharged those who were sureties for the due payment of the bill. The principle is, that he is a trustee of his execution for all parties interested in the bill. 2 Swanst. 190. Sureties, we have seen, are entitled to the benefit of every security which the creditors had against the principal debtor, and whether the surety is aware of the existence of those securities or not, is immaterial. *Ib.* 291.

Contribution.

If there are two sureties and the debtor makes default, the sureties must contribute proportionably, and the fact that the liability arises on separate instruments, affords no distinction as to this right of contribution. The law is so settled by *Deering v. Lord Winchelsea*, 2 Bos. & Pul. 270. 1 Cox, 318. When one surety has been discharged, a question arises, whether the co-surety

Thus, where Sir John Napper's estate was in mortgage (u), and he died, leaving Sir Theophilus his heir, who, upon his intermarriage with Lady Effingham, settled a jointure upon her, and covenanted to pay his father's debts, and then died, possessed of a considerable personal estate, which came to his wife, having disposed of a real estate, which was settled by an act of parliament, in trust to pay his father's debt: the heir at law brought his bill against the wife, to have the per-

Estate conveyed in trust to pay A.'s debts. Personal estate of his heir (who sold estate) liable to A.'s mortgages.

(u) *Napper v. Lady Effingham, Effingham v. Nappier*; see also post, Fitzgib. 142. 144, [S. C. cited 2 P. 980, 1.—Ed.] Wms. 664. 3 Bro. P. C. 1. nomine

is entitled to say to the creditor, asserting a claim against him, you have discharged a surety from whom I might have compelled contribution either in my own name in equity, or using your name at law. The Lord Chancellor, in a late case, seemed inclined to consider the liability of both sureties discharged. *Mayhew v. Crickett*, 2 Swanst. 192. A creditor whose debt is secured by a warrant of attorney, having received promissory notes from the debtor and two sureties, and afterwards entered up judgment, and taken the goods of the debtor and without the knowledge of the sureties, withdrew the execution, has discharged the sureties; but a subsequent promise to pay the debt by one surety, knowing that the execution has been withdrawn, renews his liability. *Ibid.*

A. mortgaged an estate, his sole property, to C. by an indenture, in which B. joined A. in charging an estate (their joint property) as a further security, and A. and B. gave their joint bond for payment of the sum advanced. A. afterwards by deed, to which B. was no party, sold the estate, his sole property, to D., who covenanted with A. to pay C. the sum advanced on mortgage to A., and to indemnify A. and B. from the payment of it. B. was called on by C. for payment of the principal and interest of the money lent on mortgage, which B. accordingly paid. It was held, that B. was not entitled to recover this sum from D. in an action against him for money paid to his use—the defendant should have been sued on his covenant of indemnity, on which alone he was liable. *Crafts v. Tritton*, 8 Taunt. 365. A guarantee in a letter will be sufficient to make a party a surety, if the lender is induced to advance his money on the faith of an assurance that provision shall be made for repaying the sum borrowed. *Garrett v. Handley*, 3 Barn. & Cress. 462. But it is the duty of a party taking a guarantee, to put the surety in possession of all the facts likely to affect the degree of his responsibility, and if he neglect to do so, it is at his peril. *Piddock v. Bishop*, *ib.* 610. The following words, "To the amount of 100*l.* consider me as a security on J. C.'s account (signed and dated,)" have been held insufficient to bind the writer—the word *consider* not being equivalent to the word *promise* or *agree*, as required by the statute, 29 Car. 2. c. 3. s. 4. See also as to guarantee, *Dixon v. Broomfield*, 2 Chit. Rep. 205. *Borrill v. Turner*, *ib.*; and as to sureties, the late case of *Lewis v. Jones*, 4 Barn. & Cress. 507. Et vide *Lechmere v. Charlton*, 15 Ves. 19.

sonal estate of the husband, upon his covenant, applied to discharge the father's mortgages, and it was so decreed. But the reason was, because the heir had disposed of the estate so settled in trust, and then it was but just and equitable, that his personal estate should be applied to exonerate the mortgaged estate, descended to the heir at law; because he was answerable for the trust estate, settled for that purpose.

Vendor has a lien on estate sold for residue of purchase-money unpaid; but if vendee sell or die, this lien ceases; yet court will sometimes restore it in favor of legatees.

Again (x), where T. M., in his life-time, agreed to purchase an estate of P. for 1200*l.*, but died before he had paid the whole purchase-money. T. M. by will, after giving a legacy of 800*l.* to his sister M., devised the estate purchased, and all his personal estate to K., and made him his executor. K. committed a *devastavit* of the personal estate and died; and the purchased estate descended upon B. K., his son and heir-at-law. P. filed a bill in equity against the representatives of the real and personal estate of T. M. and K., to be paid the remainder of the purchase-money. M., the sister and legatee of the testator, brought her cross bill, praying, that if the remainder of the purchase-money should be paid to P. out of the personal estate of T. M. and K., that she might stand in P.'s place, and be considered as having a lien upon the purchased estate for her legacy of 800*l.* *Et per curiam*, the vendor of this estate has, to be sure, a lien upon the estate he sold, for the remainder of the purchase-money; for from the time of the agreement, T. M. was a trustee, as to the money for the vendor (D). But this equity will not extend to a third person, but is only confined to the vendor and vendee, and if the vendor should exhaust the personal assets of T. M. and K., the defendant will not be entitled to stand in his place, and to come upon the purchased estate in the possession of K.'s heir. But then the heir of K. shall not avail himself of the injustice of his father, who has wasted the assets of T. M.,

(x) *Pollexfen v. Moore*, 3 Atk. 272.

(D) For similar law, see *Chapman v. Tanner*, 1 Vern. 267. *Gross v. Smith*, 1 Atk. 573. *Walker v. Preswick*, 2 Ves. 632. *Tardiff v. Scrugham*, cited Amb. 726. *Fawell v. Heelis*, ib. 724. *Blackburn v. Gregson*, 1 Bro. C. C. 422. *Cator v. Pembroke*, 2 Bro. C. C. 282.

which should have been applied in paying M.'s legacy. Therefore the estate, which has descended from K., the executor of M., upon B. K., comes to him liable to the same equity as it would have been against the father, who has misapplied the personal estate; and in order to relieve M., the legatee, P. shall take his satisfaction upon the purchased estate, because he has an equitable lien both upon the real and personal estate, and this last fund shall be left open, that the legatee, who can at most be considered as a simple-contract creditor, may have a chance of being paid out of the personal assets.

But a stranger to the original incumbrance may make his own personal estate the primary fund for the payment of it; and whether he has done so or not is a question of intention, on a review of all the circumstances of the transaction taken together, as they furnish ground to infer, that the person engaging meant to become a *principal*, or to stand as a *surety* only. The following cases will illustrate both instances:

Whether purchaser of estate subject to a mortgage has made his personal property first fund for payment, a question of intention (x).

A. purchased an estate for 90*l.* which was at that time mortgaged for 86*l.* and he covenanted to pay 86*l.* to the mortgagee, and 4*l.* to the vendor (*y*); the court admitted the rule of law above-mentioned, but, in this particular case, thought that, although the covenant was with the vendor only, and the vendee's personal estate not liable in that respect to the mortgagee, yet the words were sufficiently strong to shew an intention in the vendee to make it his personal debt (*F*).

(*y*) *Parsons v. Freeman*, before Lord Hardwicke, 25th October, 1751. Vide 2 P. Wms. 664, note (*j*).

(*E*) The six following cases in the text from Mr. Cox's note to P. Wms. shew that the court is not anxious to make an inference against the personal estate; for in five of these instances, the land was held primarily liable. The case before Lord Alvanley, p. 879, affords an instance the other way; and his Lordship there observes, that the court will be very slow in cases of this description, to onerate the personal estate with a debt which was not originally the debtor's own, but which he took with the land.

(*F*) The words not appearing on the report, there is no clue to judge of the intention, and consequently little in this case to render it applicable to subsequent occurrences. Mr. Ambler, in his report, p. 115, states Lord Hardwicke's judgment in these words:—"If the ancestor has done no act to charge

Agreement that mortgage shall be paid out of the purchase-money, makes

*Husband on
further advance
from mortgagee*

But (z) where N. was, before her marriage, indebted to sundry persons, and entitled to the inheritance of lands,

(z) *Lewis v. Nangle*, before Lord Hardwicke, 7th Nov. 1752, [1 Cox C. C. 240. S. C. Amb. 150, but better reported in Mr. Cox's note to] 2 P. Wms. 664, n. 1. Et vide 1 Ves.

jun. 187. This case is considered by Lord Camden in *Kinnoul v. Money*, as standing upon special circumstances and not on the general principle, [infra, 875, see also ante, 727, 8.—Ed.]

purchaser's personal estate primarily liable.

himself personally, the heir at law must take the estate *cum onere*; so if one purchase the equity of redemption with usual covenants to pay off the mortgage, I know of no determination upon such a case, but am inclined to think the heir could not come to have the estate exonerated. [*Sed quare de hoc*, unless the mortgagee be a party to the conveyance, and the old mortgage is vacated and a new term limited by the conveyance]. That is not the present case, which is an agreement with the vendor for purchase of an estate for a gross sum of 90*l.* to be paid 86*l.* of it to the mortgagee, and 4*l.* to the mortgagor. The question therefore is, whether the heir at law can come into this court, and have the estate exonerated by the personal estate? I am of opinion he may, for two reasons; 1st. Because it is an express contract to pay, and the representative of the mortgagor might maintain an action for the money, and so might the mortgagee oblige the mortgagor to let him make use of his name to recover the money. This is as strong a case as can well come before the court; and 2d. because it being agreed to be part of the purchase-money, the heir would (if there was nothing more in the case) be entitled to have the money paid out of the personal estate, as where one articles to purchase an estate, and dies before the purchase is completed; therefore decree" as above.

[874*]

If mortgage forms part of price of estate it becomes purchaser's personal debt.

Hence we may infer, that if on the purchase of an estate, which is in mortgage, it be agreed that the mortgagee shall be paid off out of the purchase-money, and that the mortgagee shall join in the assurance to the purchaser, and before the contract is completed the purchaser dies, his personal estate will be the fund primarily liable to discharge the mortgage, for it is in fact nothing more than the common case of a contract to buy an estate, and a death of the vendee before the purchase-money paid, where it is acknowledged the heir is entitled to have the purchase-money paid out of the personal estate of his ancestor. *Bradshaw v. Outram*, 13 Ves. 236. But a case in the House of Lords carried this point a step further, and decided, that if on the deed of conveyance there be an acknowledgment signed by the purchaser, that part of the purchase-money is retained by him for the purpose of discharging the mortgage, then his personal estate will be the fund whereon the debt must ultimately fall; for, indeed, it is the fund benefited by not having paid the full purchase-money for the estate.

Indorsement on conveyance that part of purchase money is retained to pay mortgage, an

Thus in *Belvidere v. Rochfort*, 6 Bro. P. C. 520, Lord Chief Baron Rochfort having agreed with one Hughes for the purchase of an estate which was in mortgage for 900*l.*, Hughes, by lease and release, in consideration of the 900*l.* conveyed the premises to the Chief Baron and his heirs, subject to the said mortgage, which the Chief Baron agreed to pay. On the back of the con-

charged with the payment of sundry sums; and before her marriage entered into articles, whereby the estates were to be settled to the husband for life, *sans* waste, remainder in like manner to the wife, remainder to the issue of the marriage, remainder to the wife in fee; the marriage took effect, and the husband being pressed for payment of the wife's debts, and having also occasion for a farther sum of money; they bor-

of wife's estate covenants to pay whole sum, his assets not liable to exonerate land; because it was afterwards settled, subject to the mortgage (a).

veyance was an indorsement, assigned by Hughes, acknowledging the receipt of 900*l.* thus, "450*l.* sterling in money, on the perfection of the deed, and 450*l.* allowed on account of the mortgage." The Chief Baron lived twenty years after this purchase, but never paid off the mortgage. By his will he gave the residue of his personal estate, *after payment of all his just debts*, and also all his lands, tenements, and hereditaments, not by his will disposed of, unto his son and heir George Rochfort, his heirs and assigns for ever; and appointed him sole executor. After a lapse of many years, and after the death of George Rochfort the son, the mortgaged estate which was given to a younger son of the Chief Baron, was decreed to be exonerated out of the personal estate of George Rochfort; for that he took his father's personal estate subject to the mortgage, the father having made the debt his own, and this decree was affirmed in parliament. 6 Bro. P. C. 537.

appropriation of mortgage to purchaser's own use.

We shall see, post, 881, 2, *in notis*, that if the mortgage-money form no part of the price of the estate, the purchaser's personal property will be exonerated from the payment of the mortgage debt. While this proposition in some measure tends to confirm the one proposed in this note, it serves also to fix a distinction which it will be well to remember.

What if mortgage form no part of consideration.

(G) As a general rule it may be stated, that if a wife joins her husband in a mortgage of *her* estate for the benefit of her husband, as between the husband and wife, the mortgage will be considered as a debt of the husband's; and after the death of the husband, the wife or her real representative will be entitled to stand in the place of the mortgagee, and to have the mortgage satisfied out of her husband's assets, ante, 725, 6. And it seems to be of no consequence, that it does not appear on the face of the mortgage deed, for whose use the money was borrowed, or how it was applied: parol evidence being admissible to prove the fact. *Kinnoul v. Money*, 3 Bro. C. C. 206. 212. A better report of this case has lately been supplied by Mr. Swanston, from Mr. Halliday's MSS. 3 Swans. 202. It appears that the wife was tenant in tail, and the husband became tenant by the curtesy. After the marriage a sum of 4500*l.* for paying debts of the wife due prior to the marriage, was raised by mortgage of the estates, the husband joining and covenanting for payment of the mortgage money, and a further sum of 4500*l.* was raised on a like security, and afterwards a sum of 1000*l.* for paying interest on the former sums. The wife died without issue surviving her, having by her will (in exercise of a general power of appointment reserved to her) devised the estates to her husband for life, with a limitation of them after his decease, "subject to such incumbrances as they were then subject to." Lord Hardwicke said, the general rule is that where a husband borrows money on the security of the wife's es-

General rule as to husband and wife.

[875]

Parol evidence admitted, when.

rowed 1300*l.* of the wife's sister (the original plaintiff in the cause), and secured it by mortgage of the wife's estate, and the husband covenanted for payment of the whole money, and also executed a bond conditioned for payment of the money, according to the provisos in the mortgage. *Subject to this mortgage*, the lands were settled to the husband for life, remainder to the issue of the marriage, remainder to the wife's sister (the mortgagee) in fee. N. died without issue; and the plaintiff was the devisee of the sister, who brought his bill

tate, as the money is under his power, it is supposed to come to his use; and this turns the proof on him to shew the contrary. This Court *prima facie* considers it as a pledge for the husband's debts, and his estate shall first be applied to exonerate it, unless a special case appears. But though this is the general rule, that the husband shall be liable, yet it is but an equity, and therefore it may be rebutted by another equity which may be set up by parol proof. The question here is, whether the words "subject," &c. are such as the law would have supplied, and therefore nugatory, or whether they are intended to discharge the husband of what he otherwise would have been liable to. Lord Hardwicke thought the former was the right construction. Could any stronger words be made use of by a drawer of a will, to express that the incumbrances should remain in the same state, and that no alteration was intended in the nature of them? And where the real estate is by will made liable to the debts, shall not an heir at law or an *heeres factus*, have the benefit of the personal estate to exonerate the real? Suppose a mortgagee should take a bond of a third person as a further security, and the mortgagor was to devise the land subject to the incumbrances, would this discharge the bond? His Lordship was of opinion that the husband was liable to the whole debt, subject to an inquiry whether any and what part was applied to the wife's use.

Lord Camden's expression of rule as to exoneration between husband and wife's assets.

The case afterwards came on for further directions, on which occasion Lord Camden (Chancellor) observed, that when husband and wife raise money out of the wife's estates, with the reversion to one or to the other, the Court of Chancery inquires into the uses, considers them as two persons, and if he might use the expression, dissolves the marriage *quoad* the transaction. Though the husband covenants to pay the money and gives his bond, yet the application determines who is the principal, and who the surety. The case before him was one of principal and surety; at common law the principal is first obliged to pay, and the surety only in default; in equity the surety comes in aid of the principal debtor. It had indeed been argued, that where the husband has one part and the wife another, the Court will not look too nicely into it, nor separate the debt. But no case had been cited to prove this point except *Lewis v. Nangle*, which was so particular a case that it could not serve as a precedent. Upon the whole, Lord Camden was of opinion, that the will of the wife did not charge this estate with the whole sum in exoneration of the husband. The Master was therefore directed to inquire how

against N.'s husband for the payment of the mortgage money. But the Lord Chancellor held, that although part of the money was raised for the husband's use, yet the mortgage being a single transaction, he must suppose the intention of the parties to be uniform, and that such intention was to charge the wife's estate with the whole debt; and his Lordship dismissed the bill, so far as it sought to compel the husband to exonerate the land, but directed him to keep down the interest during his life (H).

much of the debt was the wife's, and the husband was ultimately held discharged from so much of the mortgage as was applied to the wife's use, except that as tenant for life he ought to keep down the interest. 3 Swanst. 206. 217.

But if upon the face of the mortgage deed the money appears to have been borrowed for the use of the husband, which is corroborated by all other evidence, parol evidence of the wife's declaration, that the money was intended as a gift to her husband will not be allowed; so at least it has been inferred from *Clinton v. Hooper*, 1 Ves. jun. 173. S. C. 3 Bro. C. C. 201; see also 1 Rep. Bar. & Fem. 149. In this case, therefore, if the wife intends to give the money to her husband, the safer course would be to vest the estate, by fine, in trustees, upon trust, by sale or mortgage, to raise a stipulated sum for the husband's benefit. Vide 3 Bro. C. C. 213, and 1 Ves. 188. *Practice.*

(H) In this case it should be observed, that there was an additional advance to the husband, and, contrary to the general rule, the personal estate was held exempt from the payment of such advance equally with the principal to which it was a further charge. In *Tunkerville v. Pascott*, 1 Cox, 237, (S. C. wretchedly reported, 2 Bro. C. C. 57), the heir procured a further advance for the purpose of paying his ancestor's debts, and executed a second mortgage, yet his personal estate was held inapplicable to the sum borrowed by him, though he had given a substantive security for the same. The case is worthy of further attention. The following is an abridged extract from Mr. Cox's statement:

Whether rule respecting original sum applies to further advances.

F. being seised of copyhold premises in D. mortgaged some part thereof to Hogg, and other part thereof to Grace Andrew. On the death of F. intestate, these copyhold premises descended, subject to the said mortgages, on his sister and heir at law, Joan, the wife of John Colville. In 1758, J. Colville and wife, surrendered the said copyhold premises to the use of a trustee in trust, for such uses as the said Joan, notwithstanding her coverture should appoint, and in default thereof in trust, for Joan Colville, her heirs, sequels, and assigns for ever. There being considerable arrears of interest due on the said mortgages, and F. having left several debts at his death, which Colville and wife were desirous of discharging, by money to be raised by future mortgage of these copyhold premises, they joined in borrowing a sum of money of John Andrew, to be secured by mortgage of the said premises, which, together with the two mortgages made by F. and which had since vested in the

Estate descends from A. to B. subject to mortgage. B. makes further mortgage for payment of A.'s debts. B.'s personal estate not primarily liable; but both mortgages are charges on land in the first instance.

Purchaser for particular purpose covenants to pay mortgage.—Debt not thereby made personal.

So, where L. had purchased several estates, subject to mortgages, with regard to one of which he entered into a covenant to pay the mortgage-money, for the purpose of indemnifying a trustee (a); and as to another, which was only part of an

(a) *Forrester v. Leigh*, 23d and 25th June, 1773. Vide 2 P. Wms. 664, note 1.

said John Andrew as assignee of the said Hogg, and as executor of Grace Andrew, amounted in the whole to 2650*l.*; and accordingly Colville and wife, and the trustee joined in a surrender to the use of J. Andrew and his sequels in right, with a defeazance declaring the said surrender to be made upon such uses as were declared by an indenture bearing even date therewith; by which indenture the said surrender was declared to be made in the first place for better securing to the said J. Andrew, the payment of the said sum of 2650*l.* and interest, and subject thereto in trust for the said J. Colville and wife, and their assigns for their lives, and after the decease of the survivor of them, then in trust for the heirs, sequels in right, and assigns of the said J. Colville for ever. It appeared that the whole of the money borrowed was applied in payment of F.'s debts; that no part thereof ever came to John Colville, although he entered into no bond or covenant for the payment of it. The bill was filed by the heirs at law of John Colville [to whom the equity of redemption was limited by the last mortgage], praying that his personal estate might be applied in discharge of the mortgage. *Et per* Master of the Rolls:—"Upon the principles which are to decide this case there can be no doubt, It is quite immaterial whether Mr. Colville had given any bond, or had covenanted to pay the money or not. It is clear on the one hand, that when the land comes to the hands of a person encumbered, his personal property will not be primarily liable, notwithstanding he may have joined in subsequent assignments, and covenanted for the further security of the money: and so on the other hand (generally speaking) whenever the personal estate has been benefited by the money secured, that shall be the fund first liable, though there be no covenant or bond. In this case the parties who enjoyed F.'s property felt a very honorable desire to discharge his debts, and the whole money raised was so applied. Therefore, upon the general principle of the cases as between the real and personal representatives of Mr. Colville, I am of opinion, the personal estate is not to be applied in aid of the real."

If further sum borrowed be small, or if it be to pay ancestor's debts, land descended subject to mortgage, first liable to further advance. Where mortgage is to pay ancestor's debt or legacy, it is always fixed on

From these cases, it should appear, that as to future advances, the rule which exonerates the personal fund, when an estate descends to the heir subject to a mortgage, will apply to additional loans contracted by the heir; 1st, When they are small in comparison with the original sum borrowed; and 2dly, When they are procured for the honorable purpose of discharging the ancestor's debts.

It is also observable, that the lands will be the primary fund for payment of mortgages made by the heir for the purpose of satisfying his ancestor's debts and legacies as between the heir's heir and personal representatives, though there be no previous mortgage subsisting. Therefore, where an heir, in order to raise money to discharge a legacy given by his ancestor's will,

estate subject to a mortgage, upon splitting the incumbrance, both parties covenanted to pay their respective shares, and indemnify each other; Lord Hardwicke thought that these covenants would not have the effect of making the mortgages personal debts of the vendee, they having been entered into for particular purposes, and declared his opinion accordingly in the decree.

But (b), where Sir W. O. by his will of the 5th February, 1739, taking notice that his daughter C. was deaf and dumb, and that J. B. had taken care of her, devised certain real and personal estate to J. B., her heirs, executors, and administrators, in trust, by sale, or felling timber, to pay all his debts, and directed that J. B. should receive the rents and produce of his real and personal estate without account, during his daughter's life, she maintaining his daughter; and, after the death of his daughter, he gave all his real and personal estate whatsoever to J. B. in fee, and appointed her sole executrix; Sir W. O. died, March 1740, and J. B. proved the will; Sir W. O. in his life-time mortgaged part of his estate for securing 1500*l.* and interest, which remained a charge at his death. J. B. paid off 500*l.* part of this 1500*l.*, and afterwards borrowed a farther sum of 2500*l.* on mortgage of the estates, which money was, in the mortgage deed, expressly recited to have been borrowed to enable her to discharge Sir W. O.'s debts (1). J. B. afterwards died, and on the disposition made by her, and those claiming under her, of the property of Sir

Devise of real and personal estate to A. to pay debts, residue to him in fee. Mortgage by testator after will. Further charge by A. to pay testator's debts. This, and original mortgage held a continuing charge on estate as between A.'s representatives.

(b) *Perkins v. Baynton*, 2 P. Wms. 664, note 1.

mortgaged lands descending to him from the ancestor charged with his ancestor's debts and legacies, the lands were held to have no claim to be exonerated out of the personal estate of the heir. *Hamilton v. Worley*, 2 Ves. jun. 62. S. C. 4 Bro. C. C. 199; and see ante, 866, 7; and the same rules applies to a devisee in similar circumstances; see *Perkins v. Baynton*, 2 P. Wms. 664, note 1: and though he give a bond or promissory note to answer the debts or a legacy charged by the testator on the lands; yet in every instance, the real estate of the testator will be considered as the primary fund for payment, and the personal estate of the devisee as the collateral or auxiliary fund only. See *Basset v. Percival*, post, 878 a, and *Mattheson v. Hardwicke*, 2 P. Wms. 665, n.

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continued.

land in preference to personal estate of heir or devisee.

(1) As to this part of the case, see the observations post, 881, 2, 3, in note.

W. O.; this cause was instituted. The cause was first heard before Lord Bathurst, on the 19th February, 1777, when the court declared that the sum of 1500*l.*, part of the 3500*l.*, was not to be considered as a debt of the said J. B., but was to remain a charge on the real estate, and directed an account of her personal estate. By an order made on rehearing, on the 13th August, 1781, that part of the decree was reversed, and instead thereof it was declared, that the said sum of 1500*l.* appearing to have been a charge made on the estate of the said Sir W. O. in his life-time, and remaining such at his death, was to be considered as a continued lien thereon; and that the subsequent charge made on the estate by the said J. B. being expressed in the mortgage deed to have been made for the purpose aforesaid, the same, together with the 1500*l.*, amounting in the whole to the sum of 3500*l.*, was to be considered as remaining a charge on the said estates.

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Estate descends on G. S. subject to a mortgage. He on transfer covenants to pay principal, and fifty-four years after agrees to raise rate of interest. Land held primary fund.

So (c), where G. D. mortgaged lands to W. C., to secure payment of 5000*l.*, with interest at 5 *per cent.*, and by will of 22d of May, 1723, devised the lands to his nephew G. S., in tail male; remainder to the plaintiff in tail male, remainder over, and died in the same month. In 1725 G. S. suffered a recovery to himself in fee. The mortgagee calling for his money, W. G. agreed to advance 5000*l.* at 4 *per cent.* on assignment of the mortgage, which accordingly by indenture of 4th of June, 1725, was assigned to him, with proviso for redemption, on payment of the principal and interest at 4 *per cent.*; and G. S. for himself, his heirs, executors, and administrators, covenanted with W. G., that he, his heirs, &c. or some or one of them, would pay to W. G. the said principal and interest in manner therein mentioned. In 1779 G. S. agreed to raise the interest to 5 *per cent.*, and by deed covenanted with the mortgagees, that the estate should remain a security for the 5000*l.*, with interest at 5 *per cent.*; and that he, his executors, &c. would pay such interest for the same. In January, 1782, G. S. died, the interest on the mortgage being in arrear for about ten months; and the bill was brought

(c) *Shafte v. Shafte*, before Lord 664, n. 1. [S. C. 1 Cox's C. C. 207.—Thurlow, February 1786, 2 P. Wms. Ed.]

(amongst other things) to have the 5000*l.* and interest paid out of the personal estate of G. S., or at least the arrear of interest due at his death, and the additional 1 *per cent.* charged by the deed of 1779; but the Lord Chancellor was clearly of opinion that the personal estate ought not to discharge the mortgage, the land being the primary fund. His Lordship also thought that the interest must follow the principal, and that the contract for the additional interest turning upon the same subject, must be in the nature of a real charge.

And where M. D. (d), by will of 15th of January, 1746, devised estates to trustees for a term of 500 years, to raise money for payment of his debts and legacies, in aid of his personal estate; and, subject to the term, he devised the estate in strict settlement with the ultimate limitation to his own right heirs, and gave the residue of his personal estate to his executrix C. P. The executrix applied the personal estate in payment of some of his debts, and all the legacies, except a legacy to herself of 1000*l.*, and then died; whilst the limitations, in strict settlement subsisted, and, after the death of C. P., her representative filed a bill to have a debt due to C. P., and her legacy, raised; and the only person then entitled under the limitation in strict settlement dying, pending the suit, by which event the ultimate limitation to the testator's right heirs took place, a supplemental bill was filed against M. D. and

Real estate being original debtor, must bear burthen, though bond be subsequently given for debt (K).

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(d) *Basset v. Percival*, 21st July, 1786. Note (a), 2 P. Wms. 665. [S. C. 1 Cox C. C. 268.—Ed.]

(K) And if a promissory note be given, still the land will be considered the primary fund, as appears by *Mattheson v. Hardwicke*, Cox's note to 2 P. Wms. 663; in which case the testator devised an estate to A. and B. as tenants in common in fee, charged with the payment of his debts and legacies. A. paid off all the debts, and all the legacies except one of 100*l.*, for which he gave the legatee his promissory note, and died before he paid it. As to the debts and legacies actually paid by him, it was admitted on the part of his personal representatives, that he being tenant in fee of an estate subject to incumbrances, he must be presumed to have paid off those incumbrances with a view of easing the estate from them altogether; but as to the legacy of 100*l.*, the promissory note was said to be only a collateral security, and that the devised estate was the primary fund for the payment of it; and his Honor was clearly of that opinion.

A. devises to B. charged with debts and legacies. B. pays all legacies except one, for which he gives promissory note. Real estate devised, first liable,

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M. D. P., the co-heirs of the testator. To stop this suit, the co-heirs liquidated the demands of the representative of C. P. at 2070*l.*, and gave their joint and several bond for that sum; this demand was afterwards assigned to A. B., who also bought in debts to the amount of 3270*l.*, remaining due from the testator M. D., and the co-heirs gave another joint and several bond to A. B. for this sum also; so that A. B. became the sole creditor on the estate, M. D. being dead, and a bill being filed by A. B. for payment of these sums of money, the question was, whether a moiety thereof should be raised in the first place out of the personal estate of M. D., or out of the real? And his Honor was of opinion, that the real estate was the original debtor, and ought to bear the burthen.

A. tenant for life, remainder to his son in fee. Son borrows money, and he and A. join in mortgage. A. after takes mortgage on himself, and indemnifies his son, who conveys to his father in fee. A. borrows more money, and makes new mortgage for whole sum, whereby it becomes his personal debt.

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Again, where A., and B. his wife, were seised of certain estates for their lives, with remainder to their eldest son C. in fee (e). By indentures of the 4th December, 1758, in consideration of 200*l.* stated to have been paid to A., B., and C., they mortgaged part of the premises to D. for 1000 years, and subject to that mortgage conveyed the same to such uses as C. should appoint; remainder to A. for life, remainder to C. in fee. A fine was levied, and A. and C. covenanted for payment of the mortgage money. In fact, the money was borrowed and applied for the benefit of C. only. The mortgagee assigned to E., and he, in 1763, assigned to F., in which transaction all the parties again joined, and 100*l.* more was advanced; and A. and C. again covenanted for payment of the money. By deed of the 23d of February, 1767, reciting that the money had really been borrowed for the benefit of C., that he had covenanted with his father and mother to indemnify their life estates from these several mortgages, that no interest had been paid for the said 100*l.* by the said C., or K. the trustee, but all interest accrued from the mortgage to F. was still in arrear, and that C. being desirous to be discharged as well from the payment of the principal sum of 300*l.* as the arrear of interest, and all that should grow due, which arrear and growing interest, he apprehended, would with the principal sum before the death of A. and B., or before the said C. should come into

(e) *Woods v. Huntingford*, 3 Ves. 128.

possession of the mortgaged premises, amount to the value of the fee-simple thereof, had applied to A. to take upon himself the payment of the same, and to save harmless him, C.; and that in consideration thereof he would convey and assure all his right, title, and interest in the premises to A. and his heirs; the said estates were conveyed with all the usual covenants from C. for further assurance and indemnity, and K. the trustee was directed to stand seised to the use of A., who covenanted to pay all the arrears due on the mortgage (L). A. afterwards borrowed a farther sum of 40*l.* from F., and made a new mortgage to him for the whole 340*l.*

Upon these facts the question was between the heir and the younger children, whether the mortgaged premises were to be exonerated by the personal estate of A.

His Honor said this was one of the most doubtful questions he had ever had to determine. The inference he drew from these transactions was different from that Lord Thurlow drew from the transactions in *Tweddell v. Tweddell* (f); for he was of opinion, that what had been done here was sufficient to make this the personal estate of the vendee; and he had taken great pains in order to shew that his determination did not in any degree contradict the principle there established. He should state the grounds upon which he thought this case differed from that. It might be said they were nice; but they were the only grounds that could exist, unless you lay down at once, that the debt can never be made the personal debt of the vendee, unless by his expressly declaring that it shall be his personal debt. It came to this point only, whether *by acts* it may not be *necessarily* inferred, that he meant to make it a debt of his own. *Tweddell v. Tweddell* had many expressions in it which so fully governed his opinion, that he

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By acts of vendee, it may be inferred he intended to make debt his own.

(f) Ante, 869.

(L) By this conveyance A. was in the nature of a purchaser of the estate subject to a mortgage, and, as such, his personal property was not primarily liable to the payment of the debt; but how far the indemnity to his son, and the subsequent mortgage operated to alter this arrangement of the funds, is explained by Lord Alvanley, post, 884.

could not wholly omit them. Lord Thurlow began by stating, that in the first place it was absolutely necessary the executor should be liable *at law*; for if not, it was impossible there could be any equity in the heir to call upon him to pay out of the personal estate, when he would not be liable to pay at law. But though he might be liable at law, it did by no means follow, that he should be equally liable in equity, where both the personal and real estate descending upon the same person, were liable to the debt. In the known case of an obligation, binding both the heir and the executor, the heir had a right to call for exoneration out of the personal estate, which must be first applied. When by the original contract, the personal estate was the original debtor, and the real only a collateral security, it was much stronger in favor of the heir. Then this case had arisen. A man made a contract, pledging both his real and personal estate; the latter by a general obligation; part or the whole of his real estate as a specific pledge, by way of mortgage. The estate descended upon his son as heir at law. The personal estate went to the executor; and the question was, who paid the debt? It was a mixed debt of the father, but the son's only as owner of the collateral pledge, and he had a right to call upon the personal estate. Therefore, if a person succeeding to an estate of that kind had done no act to adopt the debt and make it his personal debt, his personal estate was not liable; but if by his act he had put himself so far in the place of his ancestor as to make the debt his own, that was understood to be the same as if he was the original mortgagor: but the court had been extremely anxious not to make that inference (*f*), unless where it was perfectly clear and obvious: therefore, though the mortgagee pressing for his money, the heir was obliged to have a transfer of the mortgage, and, as every one knew, no assignee would take it without some personal covenant [from the heir], upon that transaction he executed a bond to the new mortgagee, if

The whole doctrine stated and illustrated (M).

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Heir's covenant and bond on transfer of mortgage, no evidence of alteration of funds (N).

(*f*) [As the six preceding cases have fully proved.—*Ed.*]

(M) The distinctions here noticed are worthy of particular attention, and are referred to by the learned author, as necessary qualifications to the general position in page 920, *ante*; et vide 922.

Reservation of new equity of (N) Nor, as it should seem, is the reservation of a new equity of redemption any evidence of the heir's intention to make the debt his own. Lord Northing-

he did it only for that purpose, not meaning to make himself more liable, it had been determined not to make it the personal

ton, however, appears to have been of a different opinion, in *Donisthorpe v. Porter*, 2 Eden, 164. S. C. Amb. 602. His Lordship observes: "If an heir inherits a mortgaged estate, he makes the debt his own by covenant and bond and a new equity of redemption; his personal estate therefore is liable to pay, he has by his own act willed it so." This, it is conceived, is not enough. There must be something to raise a new contract—something to constitute a new debt to make the personal estate of the heir liable, and then without a new proviso for redemption, or indeed, without a bond or covenant from the heir for payment of the money, the heir may exhibit an intention to make the debt his own, for the bond, proviso, and covenant, are merely for the further security of the mortgagee,—a transaction, in fact, between him and the heir, whereas the parties to the exoneration are the heir's heir and personal representative. If therefore, it appear that the heir has made a new mortgage in order only to pay off a former mortgage made by his ancestor, and the conveyance be to the mortgagee discharged of the former proviso for redemption, but subject to the proviso in such new mortgage contained, and a new proviso be inserted, then without some other intimation of intention of transferring the debt from the real estate descended to the heir's own personal estate, neither the new proviso for redemption, nor a new bond or covenant which the mortgagee may require, or the heir voluntarily give, will of itself, make it the personal debt of the heir. See *Ancaster v. Mayer*, ante, p. 864; *Perkins v. Baynton*, ante, 877; and *Butler v. Butler*, 5 Ves. 538. 539; where the Master of the Rolls seemed to be of opinion, that the only way of making the heir's personal estate liable to the debt of his ancestor, was by the mortgagee's given him a release of the debt, and then taking a new bond or a new mortgage for a sum of money equivalent to the mortgage as a loan *de novo*; and observe Lord Alvanley's decision in the principal case in the text.

redemption on transfer of mortgage by heir, no evidence of intention to change funds. Semb.

These observations seems in a great measure confirmed by what fell from Lord Thurlow, in *Billinghurst v. Walker*, 2 Bro. C. C. 607. The testator in that case, devised renewable leaseholds charged with a legacy, and the devisee renewed, in which new lease he of course entered into a covenant for payment of rent and other covenants as tenant and owner of the leasehold property. Nevertheless, the renewed lease, and not the personal estate of the devisee was held to be the fund charged with the legacy, though previously to the renewal, the devisee had given a bond for payment of the legacy with interest. In the course of his judgment, Lord Thurlow remarked, that the difficulty was to distinguish the case before him from the cases referred to by Mr. Mansfield. His Lordship agreed, that if the testator had shewn an intent to take the debt upon himself, it would have become his debt; but here the old security remained, and the testator merely gave a collateral security. Where a man transferred a mortgage which was not his own debt, his executing a bond as a collateral security did not vary the nature of the charge, it was only a necessary act in the transfer. [So it may be said with equal force of the new proviso for redemption.] But Lord Thurlow did not mean that

This equity unaltered by renewal of lease.

estate of the party whose original debt it was. It had been attempted to prove that what A. had done came to that case, and that he joined only for that purpose. Most of the cases were of that kind; *Tweddell v. Tweddell* was of a different nature (g). That was not the case of a mortgaged estate descending upon the heir; but it was the purchase of an estate subject to a mortgage. There was no communication with the mortgagee; but upon the sale there was a mere covenant of indemnity against the mortgage by the vendee. That is strongly relied on by Lord Thurlow. In commenting on *Tweddell v. Tweddell*, he does not seem to disapprove the case of *Parsons*

(g) Ante, 862.

such a transfer would discharge the debtor from all liability personally with his creditor, but it did not throw the charge on his personal estate. Nothing passed in the case before him to vary the charge. All the cases of sale turned upon this,—whether the charge was considered as part of the price. The mere purchase of an estate subject to charges, as an equity of redemption, did not make the personal estate of the purchaser liable to the charge but if the charge were part of the price, then the personal estate would be liable.

Purchaser
makes debt his
own, when.
[883*]

With respect to a purchaser, it may be inferred from this latter wording of Lord Thurlow's judgment, that if a man purchase an equity of redemption subject to a mortgage, and the mortgage-money forms no part of the consideration for the purchase, the mortgage will be considered a real incumbrance merely, and not a personal debt of the purchaser. And so it will be though the purchaser covenant to pay the money and to indemnify the vendor. Vide S. L. 1 Bro. C. C. 464. *Forrester v. Leigh*, ante, 876. *Tweddell v. Tweddell*, ante, 862. *Butler v. Butler*, cited ante, p. 863, n. (T); et vide this distinction ante, p. 873.

Purchaser's co-
venant with
vendor, no ap-
propriation.
Sed contra, if
he covenant
with mortgagee.

In reference to a covenant, it is clear, that if the purchaser merely covenant with the vendor to pay the mortgage-money, he will not be considered as having made the debt his own, for a covenant with the vendor mortgagor only, to pay the mortgage's money, will not enable the mortgagee to sue the purchaser at law, though under such covenant the mortgagee might oblige the mortgagor to let him make use of his name to recover the debt. Where, however, the purchaser by any communication with the mortgagee takes upon himself the debt so as to give the mortgagee a right to sue him at law, he will be considered as having made his personal estate primarily liable, and as having converted the real estate into an auxiliary fund only. The point is not definitively settled, but it is reasonable to suppose that such will be the decision. Mr. Coote, however, appears to entertain a different opinion. See Coote Mort. 497, et vide *Waring v. Ward*, 5 Ves. 670. 7 ib. 332, and *Oxford v. Rodney*, 14 ib. 417. S. C. infra, 884, in *notis*, which see, and observe the distinctions there drawn.

v. *Freeman* (h); but seems to agree with Lord Hardwicke's reasoning, and recognizes the principle as far as it can be taken from the short note in *Ambler*. He intimates his doubt of *Lord Rochfort v. Belvidere* (hh), upon which therefore I shall not rely, as there are many difficulties occurring against that judgment, though by so high an authority. *Tweddell v. Tweddell* amounts only to this, that where a man buys subject to a mortgage, and has no connection or contract or communication with the mortgagee, and does no other act to shew an intention to transfer that debt from the estate to himself, as between his heir and executor; but merely that which he must do, if he pays a less price in consequence of that mortgage, that is, indemnifies the vendor against it, he does not by that act take the debt upon himself personally.

Nor is purchaser's indemnity to vendor on his buying estate subject to mortgage.

It remained (his Honor said) to consider whether in this determination, he did infringe upon that principle. He should be extremely sorry to do so, and had taken so much time in order to be sure he did not. It was very unpleasant for a Judge, where an inference was to be drawn from equivocal acts, and the facts upon which the decision turned, were distinguished by such nice lines. This was a sale of the estate by C. to A., who took upon himself the payment of his money, to which before he was liable at law, and C. both at law and in equity. The question was, whether that transaction and the subsequent loan of 40*l.*, and new mortgage by A. acting as owner (o), did not make that debt his own? He could not collect that Lord Thurlow said, a man never could make a debt his own without an express declaration; and no case short of that could have that effect, if this was not suffi-

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(h) Ante, 873.

(hh) 6 Bro. P. C. 520. S. C. ante, 874, in *notis.*—Ed.]

(O) It may be said, that when an heir at law enters into a new covenant for payment of the money, and re-models the proviso for redemption, and covenants for the title, he acts as owner of the estate, which he really is, but these acts have been held insufficient to throw the burthen on the personality—there must be something on the face of the deed to show an act of ownership and explicit acknowledgment of the debt, beyond a mere covenant, bond, or new proviso for redemption. See note (N), p. 882, ante.

cient. His Honor was of opinion, that under all these circumstances A. had clearly adopted the debt and made it his own, though primarily the debt of his son in equity, and of himself and his son at law. The transaction in 1767, and the subsequent one with F., shewed he meant to put himself in his son's place, who had therefore a right to be exonerated out of his personal estate (P).

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Parol evidence
admissible to
shew amount of
debts, and tes-
tator's declara-
tion as to per-
sonal estate
(hh).

I shall finish my observations on this subject with observing, that, upon a full investigation of this doctrine, it seems to warrant a conclusion, that in all questions of this nature, parol evidence is admissible as to the *quantum* of the debts, and the amount of the personal estate, and, so far as affects the personal estate, as to the declaration of the testator in that

(hh) [See, for the modern view of this subject, *infra*, 889, 890, *in notis*. —Ed.]

Indenture be-
tween mort-
gagor, mort-
gagee, and pur-
chaser, which
contains a new
proviso for re-
demption and
covenant by pur-
chaser to pay
money, an ap-
propriation of
debt to pur-
chaser's own
use.

(P) It will here be in order to introduce the two recent cases of *Oxford v. Rodney*, 14 Ves. 417; and *Scott v. Beecher*, *ubi infra*. In the former case it was held, that though a purchaser of an equity of redemption will not, as between his personal representatives, make the mortgage debt his own, even by a covenant to pay the money, (that being considered merely for the indemnity of the vendors,) yet he will, if beyond that he enters into a new contract with the mortgagee, as for different times and modes of payment, &c. The deed on which the case turned, was an indenture between the mortgagee of the first part, the mortgagor of the second part, and the purchaser of the third part. After reciting the title and mortgage for 2000*l.*, and that the mortgagor had agreed with the purchaser for the sale to him of the premises subject to the mortgage for 1360*l.*; it was witnessed, that in consideration of that sum, the mortgagor conveyed to the purchaser his equity of redemption in the usual way, with covenants for title which excepted the mortgage. The mortgagee covenanted with the purchaser, that if he (the purchaser) should pay to the mortgagee the sum of 2100*l.*, viz. 50*l.* on the 24th December then next, and 2050*l.* on the 24th June, 1796, then the mortgagee, his executors, &c. would assign the residue of the said term (the property being leasehold, and mortgaged for the whole term wanting ten days) to the purchaser or as he should appoint, free from incumbrances by the said mortgagee committed in the mean time. Lord Oxford, the purchaser, (who was then deceased) covenanted with the mortgagee to pay the said sum of 2100*l.* in the shares and upon the days before-mentioned; and it was provided that it should be lawful for Lord Oxford to hold and enjoy the said premises until default in payment. Sir Wm. Grant, M. R., in delivering his judgment said, the question was, whether the mortgage was properly payable out of the personal estate of Lord Oxford as being his debt, or whether it was one of the mortgages directed by his will to be paid out of his personal estate and other funds provided for

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respect; for it appears plainly, that the throwing incumbrances upon the personal estate, though expressly charged upon the real estate, is an equity adopted in conformity to the principles of the common law, which favored the terre-tenant. And an equity may in all cases be rebutted by parol evidence; for in

that purpose? By the above-mentioned deed there was a direct contract with the mortgagee. As between the purchaser and the vendor of the equity of redemption, there was nothing but a purchase of a mere equity, subject to the mortgage; but the contract was with two different persons, having different interests in the estate: one an equitable interest, the equity of redemption: the other the legal interest, the mortgage. The purchaser contracted with both at the same time; and both joined in the conveyance to him. From the owner of the equity of redemption he purchased his right to redeem; and, having done that, immediately entered into another contract, for the purchase of the other interest from the mortgagee; with a covenant from the owner of the legal estate to take it from him upon payment of the mortgage money at particular periods and in particular proportions; and there were covenants to pay that sum at those periods and in those proportions, and, until default of payment in that mode for quiet enjoyment. This was different from *Tweddell v. Tweddell*, (2 Bro. C. C. 101. 152. S. C. ante, 862), and different in the circumstance upon which that case mainly rested, viz. that, in that case there was no contract whatsoever with the mortgagee; whereas in the case before the court there was not only a contract and undertaking with him for the price of his interest, but a benefit was obtained from the mortgagee, which the purchaser could not have had from the vendor, viz. the right to hold and enjoy. That, the vendor could not have given; as the mortgagee might have foreclosed the equity of redemption. His Honour, therefore, decreed, that by the above transaction Lord Oxford had made the mortgage debt his own. At least, so it is inferred, though no statement of the decree is annexed to the report of the case. See 14 Ves. 424, 425.

In the above case, Sir W. Grant remarked, that it was not very easy to reconcile the decision in *Tweddell v. Tweddell*, with the principle established by Lord Hardwicke, in *Parsons v. Freeman*, (2 P. Wms. 664, ante, 873), and recognized by Lord Thurlow himself, in *Billinghurst v. Walker*, (2 Bro. C. C. 604), viz. that, where the mortgage-money is taken as part of the price, the charge becomes a debt from the purchaser. The case of *Tweddell v. Tweddell*, his Honor added, was certainly very much a subject of doubt subsequent to its decision: Lord Alvanley, in *Butler v. Butler*, 5 Ves. 534, plainly enough intimated, that he should have been of a different opinion, if that authority had not stood in the way; and in *Woods v. Huntingford*, 3 Ves. 128, his Lordship stated what he conceived to be the import and effect of the case of *Tweddell v. Tweddell*; that it amounted only to this: "That, where a man buys, subject to a mortgage, and has no connexion, or contract, or communication, with the mortgagee, and does no other act to shew an intention to transfer that debt from the estate to himself as between his heir and executor, but merely that, which he must do, if he pays a less price in consequence of that mort-

If beyond indemnity to vendor purchaser enters into new contract with mortgagee, as for different times and modes of payment, &c. he makes mortgage debt his own.

Observations on Tweddell v. Tweddell.

Purchaser cannot by implication make debt his own without concurrence of mortgagee in conveyance.

such cases the evidence is not adduced in contradiction to the written instrument, but in support and affirmation of it, according to its legal operation. Lord Talbot appears to have been clearly of opinion, that such evidence may, in such cases, be gone into, in order to ascertain the *quantum* of the debts, and the amount of the personal estate, from thence to decide on the intention of the testator, with respect to discharging

gage, that is, indemnifies the vendor against it, he does not by that act take the debt upon himself personally." Indeed, in the very short statement of Lord Thurlow's judgment upon the re-hearing of *Tweddell v. Tweddell*, his Lordship seemed to rest entirely upon the ground, that the contract was nothing more than a contract of indemnity against the mortgage; that it was not a contract giving any direct and immediate right against the purchaser to the mortgagee; but only indemnifying the vendor, in case he should be sued by the mortgagee. The principle, Sir W. Grant further observed, was right; if that were the real result of the facts. The agreement was for a given price, 3500*l*. The purchaser had then to pay what was due to the mortgagee, and the rest to the vendor. It was very doubtful upon that, whether the mortgage was not taken as part of the price. But *Tweddell v. Tweddell* was supposed to have carried the doctrine to its extreme length. It was not therefore to be extended to a case that was fairly distinguishable from it; though it was then to be looked upon as an authority to the extent to which it went: as it was not so material, that these arbitrary rules should be the one way or the other; as that they should be fixed. 14 Ves. 417. 423.

Effect of transfer of mortgage by heir or purchaser.

It is necessary here to remark some slight shade of difference between an heir at law and a purchaser, in regard to the effect of a transfer of a mortgage with a new proviso for redemption. In the case of an heir at law taking an estate from his ancestor subject to a mortgage, if it appears that the heir being pressed by the mortgagee for the money, joins in the transfer of a mortgage, vacates the old proviso and enters into a new one for payment of the money at a day to come, this proviso we have seen (ante, 881, 2), will not make the debt his own; for the new mortgage being made only in order to pay off the old incumbrance of the ancestor, no intention can be attributed to the heir that he thereby meant to ease the land by taking the debt upon himself. So likewise, it is presumed, the law may be stated as to a purchaser. If at the time of the purchase the transaction does not warrant the conclusion that he intended to make himself personally liable, and on a transfer of the mortgage under circumstances similar to those lastly mentioned, he merely concurs in the assignment for the satisfaction of the transferee, then, notwithstanding the new proviso with different stipulations as to days and times of payment, with a covenant from the transferee that the purchaser shall enjoy till default, no sound reason presents itself to vary the law in this latter instance from that previously stated in regard to the heir. Nevertheless, if it can be inferred from the above-mentioned case of *Oxford v. Rodney*, that such would not be the law as to a purchaser, then, it is presumed, the same in

the personal fund; for his Lordship observed, in the case of *Stapleton v. Colville* (i), that "what the *quantum* of the debts, or the amount of the personal estate was at the testator's death, did not appear, if it did, it would give a great light into the matter."

(i) Ante, 819.

ference would apply in derogation of that statement with respect to the heir. Either this conclusion must follow, or the cases are at variance in principle. Whether if the heir or purchaser on the transfer of the mortgage, were to borrow a further sum, whereby the new proviso would refer not only to different days and times of payment, but also to a different amount, an intention to make the debt a personal burthen would be inferred, must remain a question, as no authority occurs to balance the numerous reasons that might be advanced on either side of the argument. (See and consider *Oxford v. Rodney*, in comparison with the law, as stated in the former part of the note (F), ante, p. 873. If, however, A. mortgages an estate to B., and afterwards sells his equity of redemption to C., then, whether the personal estate of the purchaser shall be exempt or liable to the payment of the mortgage debt in the first instance, depends on the circumstance, whether the purchase be of the equity of redemption merely, or of the whole estate at a stipulated price out of which the mortgage money is to be paid. If the purchaser, having undertaken to pay this sum to the mortgagee, enters into a new contract with him to continue the charge on the land, and the three parties join in the assurance to the purchaser, (which, in fact, will then assume the character not only of a conveyance but also of an original mortgage,) the purchaser will by this transaction be considered as taking the *onus* of the debt on himself, and as making his personal estate primarily liable. Vide supra, p. 873, n. (E), and 882, n. (N).

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To obviate all doubt in cases involving questions of this sort, an express declaration of the intention of the parties should always be added. A form of such declaration, supposing the intention to be, to subject the personal estate of the purchaser to payment of the mortgage as the primary fund, will be added in the Third Volume.

In *Scott v. Beecher*, 5 Madd. Rep. 96, (the latest case to be found in the books on the subject of this chapter) John Tyson being entitled to a copyhold estate, mortgaged the same to Mills to secure 1000*l.*, and afterwards surrendered the same to Mills and his heirs, pursuant to the covenant in the mortgage deed. Tyson died in 1814, and by his will devised all his estate and effects to his wife, Elizabeth Tyson, and in particular his copyhold estate, and appointed her executrix. On the death of Elizabeth Tyson, letters of administration of her estate were granted to the plaintiff; and the question was between him and Elizabeth Tyson's heir at law, whether the mortgage was to be borne by her personal estate, or whether the copyhold descended to the heir *cum onere*. The Vice Chancellor observed, that Elizabeth was devisee of the copyhold estate, and was also residuary legatee and executrix of the mortgagor. If she had thought fit she might have paid off the mortgage out

Mortgagor devises estate mortgaged to his wife, as also his personal estate, and appoints her executrix. She dying, her heir held not entitled to an exoneration out of the personal estate.

Lord Northington's doctrine to the contrary deemed untenable.

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Lord Keeper Henley, indeed, in the case of *Stephenson v. Heathcote* (ii), expressly said, no examination could be had. But it is clear from his Lordship's observations, that he did not advert to the principle upon which Lord Talbot was of a different opinion, and which is supported by innumerable instances at law and in equity. The Lord Keeper observed, in the case of *Stephenson v. Heathcote*, that the intent of the testator was to be collected from the words of the will, and from no circumstances out of it, and that upon general principles and rules established in the cases the court could not go into the testator's circumstances, as it would establish a rule not to be adhered (q). Lord Talbot would not have denied this doctrine, had the equitable inference on the devise then in question been conformable to the express language of the will; but that not being the case, the real estate being expressly charged with his debts by the will, and the personal estate being only subjected thereto, by conclusion of equity, in express contradiction to the language of the instrument, another principle, equally operative as that stated by Lord Henley, intervened, *viz.* that any evidence which tends to shew that the intention is conformable to, and in corroboration of, the

(ii) [This case is reported by parol evidence, and ante, page 808, Mr. Eden, vol. i. 38, and referred to n.(S), on the general subject.—*Ed.*] *infra*, 889, in *notis*, on the point of

of the personal estate of her husband; for it was admitted, that she possessed assets sufficient to pay all the debts, including the mortgage, and it might therefore be said, that she elected to continue the mortgage as a charge on her real estate. But his Honor apprehended, that this was not a case on which her personal representative was bound to make out any such fact of election. By the gift to her as residuary legatee, the personal estate of John Tyson became her personal estate, but the mortgage debt of John Tyson was not her debt, and her heir, therefore, had no equity to have this mortgage paid off out of her personal estate. The bill was, consequently, dismissed with costs.

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(Q) The Lord Keeper's words, as stated by Mr. Eden, were these, "I have very great disinclination in admitting parol evidence to explain a will. At common law it is a rule that no parol evidence can be given of a man's intent who has put it into writing, except to explain a latent ambiguity;" citing *Lord Chetney's case*, 5 Co. 68. *Couden v. Clarke*, Hob. 32. *Jones v. Newman*, 1 W. Bl. 60. *Dowsett v. Sweet*, Amb. 175; and *Lowfield v. Stoneham*, 2 Str. 1261. See 1 Eden, 39. Of the admissibility of parol evidence to explain, vary, or discharge written instruments, see 1 Phill. Evid. 566, 4th edit.

letter of the instrument, is admissible, and ought to be received.

And *Lady Gaynsborough's case* appears to me to be fully in point as to the admissibility of parol evidence in such cases of the testator's declarations, respecting his personal estate and debts.

Admissibility of parol evidence supported by Lady Gaynsborough's case (R).

There Lord Gaynsborough devised several legacies (*k*), and charged them upon his Rutlandshire estate, and likewise charged his lands with the payment of his debts, and made his Lady executrix; but did not devise to her all his personal estate in express words; but it was in proof that he declared that his Lady should have his personal estate, by five witnesses of reputation, and that my Lord found fault with the will after it was writ, because the personal estate was not given to her, and that the person who writ the will, told him, that being made executrix, she had it by law, without any express gift. And it was held by the Lords Commissioners unanimously, that the Lady ought to have the personal estate exempt from debts and legacies; because the written will charged all debts and legacies upon the lands, for there were seven legacies given, and in every paragraph the conclusion was, to be paid out of his lands; and although parol proofs could not be admitted in contradiction of the will, yet when they went only in confirmation and corroboration of what appeared to be the testator's intent by his written will, there they might be made use of to fortify it. And it was decreed, that the lands should stand charged with the legacies, and in case my Lady was sued for any of the debts, she was to be reimbursed out of the lands.

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Upon this principle of the evidence being an affirmation of the law on the written instrument, the court declared, in

Proof of parol declaration that testatrix in-

(*k*) *Lady Gaynsborough's case*, 2 Freem. 188. 247. S. C. 2 Vern. 252, 3.

(R) This is a weak case to support the general proposition, that evidence is admissible to prove which fund the testator intended should be charged with his debts,—the next is a much stronger case, see *vide* Lord Northington's observations hereon in the next note.

tended surplus
for devisee, ad-
missible, if
wanting.

the case of *Crompton v. North* (l), where the testatrix devised her lands to N. to sell and dispose of for payment of debts, and the heir brought his bill, insisting, that as to the surplus after debts paid, it belonged to him by a resulting trust being not disposed of by the will; that the estate in law being vested in the devisee, he should have been admitted to his proof of the testatrix's parol declaration, that she intended the surplus for the devisee, if it had been wanting and necessary (s).

(l) Vide 2 Vern. 253, 254, [and ment in *Clinton v. Hooper*, 3 Bro. C. C. see the same point adduced in argu- 205.—Ed.]

Parol evidence
of intention to
exempt person-
ally from debts
rejected.

(S) In *Stephenson v. Heathcote*, 1 Eden, 40, Lord Keeper Henley said, if he could satisfy himself upon what grounds the decree in *Lady Gainsborough's* case was founded, he should think himself bound by it; but it seemed by the petition of appeal, to have been founded in fraud in the drawer of the will, who designedly omitted to frame the will according to the instructions which he had received. His Lordship added,—In the case of resulting trusts for the benefit of the next of kin, it is not to be questioned but that executors may make use of parol evidence to rebut their equity; but the case before him did not turn upon the point of rebutting equities. The executrix brought her bill to be reimbursed what she had paid in the course of law, and the evidence afforded was to shew what was given to the executrix by the will in writing. If parol evidence were admitted in the present case, it might be admitted in every one. But without considering it as the bill of the executrix, Lord Northampton relied on this, that in all the cases in which parol evidence had been admitted, it had been for the purpose of supporting legal rights against an equitable claim. If parol evidence were to be admitted in the case before his Lordship, it would be pregnant with great mischiefs and inconveniences; and Lord Northampton thought the courts should not go a single step further than the cases had already gone. 1 Eden, 41.—Lord Hardwicke has also added his sanction to this view of the subject. In *Inchiquin v. French*, he said that it would be a dangerous thing to go into any evidence with regard to the external circumstances of the case, and to shew that the debts would be greater than the personal estate; for the words of the will, and not the circumstances of the testator, were to guide courts in their construction, 1 Cox, 9. S. C. on other points, ante, p. 807, n. (Q). So my Lord Eldon, in *Boote v. Blandell*, observed, that with regard to circumstances *dehors* the will, which had been sometimes called in to assist in explaining it (such as the respective amount of the real and personal estate—the greater or less degree of personal favor which the testator might be presumed to have entertained towards this or that object of his bounty, and others of that nature,) he apprehended that they ought all to be set aside in the consideration of a question depending on a will, such question being fit to be decided only by an examination of the whole will taken

together. 1 Meriv. 216. And Lord Manners, in a recent case, considered it clearly established that the intention of the testator must appear from the will itself and could not be collected from extrinsic circumstances; for although Lord Talbot, in *Stapleton v. Colville*, Ca. Temp. Talb. 302, had been made to state otherwise, that had been considered as a mistake, and had been expressly denied by Lord Thurlow, in *Ancaster v. Mayer*, 1 Bro. C. C. 454; and Lord Alvanley, in *Brummell v. Prothero*, 3 Ves. 111, ante, 837. *Aldridge v. Wallscourt*, 1 Ball & Be. 315. From the whole, therefore, we may safely conclude, that parol evidence of the testator's intention to bequeath his personal estate exempt from the payment of debts will be rejected; et vide S. L. ante, 805, note (N).

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In the conclusion of this chapter it is proposed to consider,

I. The cases on marshalling or arranging assets; and

II. Those concerning contribution.

I. The rule in equity, as to marshalling assets in favor of simple-contract creditors and legatees is this,—that when a creditor by specialty has the option of resorting to both the real and personal assets for satisfaction of his debt, and simple-contract creditors or legatees have the power of resorting to the latter fund only for payment of their demands, if there be a deficiency of the personal estate to pay both of them, the court will so marshal or arrange the different estates, as to confine the specialty creditor to the real fund, if sufficient, for satisfaction of his debt, in order that the personal estate may be left free to answer the demands of the simple-contract creditors or legatees; or in case the specialty creditor shall have received payment of his debt out of the personal assets, then the court, upon proper application, will permit the simple-contract creditors or legatees to receive satisfaction out of the real estate to the amount of what such specialty creditor was paid out of the personal fund. But in order to enable the court to extend to simple-contract creditors or legatees these advantages, the real estate must be charged with the payment of debts, or of one or more legacies, or when there is no such charge the specialty creditor must have a *lien* upon the estate, except when the owner of it is heir at law; and then, as against him, the simple-contract creditors or legatees will be permitted to throw the general bond debts upon the lands, in exoneration of the personal estate. But against a devisee of the estate, it seems that there must be some such lien as before-mentioned, as by virtue of a mortgage, judgment, or otherwise. And it is observable, that this marshalling or arranging of the assets well be made as well against a copyhold as a freehold estate. See *Aldrich v. Cooper*, 8 Ves. 382. S. C. ante, vol. i. 344, n. (C). *Forrester v. Leigh*, Amb. 174. *Attorney-General v. Tyndal*, ib. 615. S. C. 2 Eden, 207. *Herns v. Meyrick*, 2 Salk. 416. *Trimmer v. Bayne*, 9 Ves. 209; and *Tomlinson v. Ladbroke*, at the Rolls, after Hilary Term, 1809. *Anon.*, 2 Ch. Ca. 4. *Culpepper v. Aston*, ib. 117. *Lutkins v. Leigh*, Ca. Temp. Talb. 53. *Tipping v. Tipping*, 1 P. Wms. 730.

Modern rule as to marshalling assets.

The consequence is, that if a person having two real estates mortgages both to one person, and afterwards only one estate to a second mortgagee, the court, in order to relieve the second mortgagee, will direct the first to take his satisfaction out of that estate which is not in mortgage to the second mortgagee, if that be sufficient to satisfy his demand, and this, even though the estates

Instances of this rule in reference to mortgagees, creditors, and legatees.

descend to two different persons. *Lacey v. Athol*, 2 Atk. 446. So, if there are specialty creditors, a mortgagee of freehold and copyhold must take his satisfaction out of the copyhold estate; for the specialty creditors cannot originally and of themselves resort to the copyhold lands, for they are not assets. But if the mortgagee should resort to the freehold, the creditors by specialty may stand in his place as to the copyhold estate, 8 Ves. 382; and ante, p. 344, n. (C), which over-ruled *Robinson v. Tenge*, stated by Mr. Cox, in his note to 1 P. Wms. 680. And the rule would be applied, though by this means a subsequent incumbrancer might acquire a right to tack; as suppose a man to have a freehold and copyhold estate, and to mortgage both of them to A., and afterwards the freehold only, to B., and then die indebted to B. not only on mortgage but also on bond or covenant; in this case, B. would have a right to throw A. on the copyhold, being the estate to which he himself had no power to resort, 8 Ves. 395, 396. In like manner, if a mortgagor sell part of the mortgaged estate, though, in respect of the mortgagee, he would have a right to have both parts of the estate applied to his satisfaction; yet, on a bill by him for a sale or foreclosure, the equity would be, that the estate sold should not be liable, unless the other part was not sufficient for his satisfaction. *Kirkham v. Smith*, 1 Ves. 261. And in the above-mentioned case of *Aldrich v. Cooper*, it was stated by Sir S. Romilly, *arg^o*. and acquiesced in by the Chancellor, that where the crown, by an extent, has taken a mortgaged estate, and deprived the mortgagee of his security, the Court of Exchequer has marshalled in his favor, by letting him stand in the place of the crown upon other funds not comprised in the mortgage, and that even in bankruptcy in a question with the general creditors. See 8 Ves. 389, 395; et vide *Sagitary v. Hyde*, 1 Vern. 455. But it may be fairly questioned, whether the benefit of this rule will be extended to a residuary legatee; and it should be remembered that when a creditor is admitted to another fund, it is only to the extent of the fund on which his claim originally attached. *Wilson v. Fielding*, 2 Vern. 763. It is merely necessary to add, that marshalling assets, in the proper acceptation of that word, forms the subject of the second chapter of lib. iii. of the Trea. on Eq. p. 285, 5th edit.

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Devise, after payment of debts, of mortgaged estate to A. and of another estate to B. both estates must contribute equally towards discharge of mortgage.

II. As to the cases on contribution, it is observable, that if mortgaged lands and unincumbered lands are devised to two different persons expressly after payment of debts, then if the lands are resorted to for payment of the mortgage, each estate will be liable to contribute proportionably towards the discharge thereof. *Carter v. Barnardiston*, 1 P. Wms. 504; and see 2 Bro. P. C. 1. So, in another case, where by settlement two estates, one in Norfolk, and the other in Suffolk, were subjected to the raising of a portion of 2000*l.* to a daughter by a term of 500 years, to commence after the respective deceases of two several lives; one life upon the Suffolk estate, and the other upon the Norfolk estate, and the life on the Suffolk estate first fell in; the daughter brought her bill for the 2000*l.*, which J. S., to whom that estate was limited, paid. Afterwards the life on the Norfolk estate fell in; and the fee simple thereof descended to the daughter: and it was decreed that J. S., who had paid the portion, should have contribution out of the Norfolk estate, in proportion to its value. But with this, that the term being to commence and take place as the former estates fell in, and the lives upon the Suffolk estate first dying; in adjusting what proportion each estate should pay, the Suffolk estate

was to be valued as an estate in possession, and the other as an estate in reversion; and the value of the term on each estate was to be fixed by what it would be worth if sold. *Haveningham v. Same*, 2 Vern. 355. S. C. 1 Eq. Ca. Abr. 117, pl. 5. The recent case of *Aldrich v. Cooper*, 8 Ves. 382. 384, affords this additional remark, that if freehold and copyhold lands are mortgaged together, and, upon the death of the mortgagor, one estate descends to his heir at law, and the other to a different person, being his customary heir, and the lands are resorted to for payment of the money, a value must be set upon each estate, and then each must bear its proportion of the charge. And if the mortgage deed says, that "for better securing the mortgage money, the mortgagor covenants to surrender, &c." yet must the copyhold contribute in proportion; for the words "for better securing the payment" were not thrown in for the purpose of making the freehold estate first applicable, but were the common form of a mortgage of freehold and copyhold estates, in order to save the fine on admission to the latter.

So where there is a mortgage of freehold and copyhold lands to secure same debt, though latter be but for better security.

On this rule it has been holden that the original lessee has a right to call upon the derivative lessee to declare whether he will renew or not, and if he declares that he will renew he must contribute to the renewal fines in proportion to the quantity and quality of the land comprised in his lease. *Frankfort v. Thorpe*, 2 Ball & Bea. 379.

Derivative lessee must contribute on renewal.

CHAP. XIX.

OF THE PAYMENT OF INTEREST. (A) OF MONEY LENT ON
MORTGAGE, &C. (B).

Interest reserved or taken above 5 per cent. renders security void.

BY the 12 Ann. stat. 2. c. 16. s. 1, all bonds and assurances for the payment of any principal money to be lent upon usury, whereupon there shall be reserved, or *taken*, above five pounds in the hundred for a year, are declared utterly void (c).

Interest defined.

(A) Interest is defined by Dr. Adam Smith, to be the compensation which the borrower pays to the lender, for the profit which he has an opportunity of making by use of the money; part of that profit naturally belonging to the borrower, who runs the risk and takes the trouble of employing it, and part to the lender, who affords him the opportunity of making this profit. See 1 Smith's Wca. Na. lib. 1. c. 6, p. 70, edit. 1819.

Contents of chapter.

(B) As well as this chapter can be reduced to a systematic arrangement, it treats, 1st. Of the existing statute of Usury; 2d. Of interest on securities of Irish and colonial property, from 894 to 899; 3d. Of agreements in variation of interest on punctual or irregular payment, from 900 to 903; 4th. Of what a surety or transferee may consider principal bearing interest, from 904 to 908; 5th. Of the conversion of interest into principal, from 908 to 921, and again at p. 932; 6th. Of the payment of interest by a tenant for life and a tenant in tail; whether such tenant in tail be infant or covert, from 922 to 931; 7th. Of the payment of interest to scrivener having custody of security, from 932 to 933; 8th. Of the effect and legality of different kinds of *tenders*, from 933 to 941; 9th. Of varying interest by subsequent parol agreements, from 941 to 943; 10th. Of the apportionment of interest when a tenant for life, having to pay the same, dies in the interval of a current half year, in 943; and, lastly, Of the admissibility of parol evidence to prove an usurious taking, in pages 943, 4, 5.

Interest allowed, though not reserved.

As an elementary principle, it may be here observed, that interest will be given on a mortgage, though it be not reserved to be payable. Thus, in an *Anonymous case* in the Exchequer Chamber, interest on the sum lent was given on a deposit of deeds which was accompanied with a promise to execute a mortgage when called for. 4 Taunt. 876. In like manner, it has been holden, that interest will be due on a bond, notwithstanding it be not expressly reserved. *Farquhar v. Morrice*, 7 T. R. 124, et vide ante, vol. i. p. 291, n. (D).

Interest above 5 per cent. avoids security, and incurs penalty of treble value.

(C) The words are, that "no person or persons whatsoever shall take, directly or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of five pounds for the forbearance of 100l. for a year, and so, after that rate, for a greater or lesser sum, or for a longer or a shorter time, and that all bonds, contracts, and assurances what-

Upon this clause of the statute, not only mortgages, where more than 5 *per cent.* is reserved, will be void, but also mortgages, drawn only for 5 *per cent.* if the mortgagee takes above that sum (a) (D).

(a) *Addington v. Cann*, 3 Atk. 154.

soever, for payment of any principal, or money to be lent on usury, whereupon or whereby there shall be reserved or taken above the rate of five pounds in the hundred as aforesaid, shall be utterly void, and that all and every person or persons whatsoever, which shall take, accept, and receive, by way or means of any corrupt bargain, loan, exchange, chevizance, shift, or interest, of any wares, merchandize, or other thing or things whatsoever, or by any deceitful way or means, or by any covin, engine, or deceitful conveyance, for the forbearing or giving day of payment for one whole year, of and for their money, or other thing, above the sum of five pounds for the forbearing of 100*l.* for a year, shall forfeit, for every such offence, the treble value of the monies, wares, merchandizes, and other things so lent, bargained, exchanged, or shifted."

(D) The contrary doctrine was advanced by Sir Thomas Plumer, V. C. in *Jennings*, *Ex parte*, 1 Madd. Rep. 331. His Honor held, that if usurious interest be not contracted for, the security will not be invalidated by subsequently taking usurious interest. That, Sir Thomas Plumer said, was very clear: and adduced this example:—"If a bond be given, securing money with 5 *per cent.* interest, and 7 *per cent.* is afterwards agreed to be given, that is usurious, but the bond is not invalidated, and the obligee has a right to the money secured by it with 5 *per cent.* interest." On this part of the case of *Jennings*, *Ex parte*, a reasonable doubt may be entertained, 1st. Because no reference was made in that determination either to the statute of Anne, or to the previously decided cases on the subject; 2d. Because those cases had before settled the question directly to the contrary; and, 3d. Because the statute itself (which must be its own expositor) definitely enacts, that the taking usurious interest shall avoid the security as part of the penalty; at least, so the writer of these notes reads the statute, and he submits that such must be its sound interpretation. Lord Hardwicke was of that opinion, when he decided the above case of *Addington v. Cann*, and conformably to that opinion, his Lordship added, that the usurious taking might be proved by parol. See *infra*, p. 943, 4, 5. From the case of *Fisher v. Beasley*, 1 Dougl. 235, it may be inferred that Lord Mansfield entertained the same sentiments; and the taking usurious interest seems to have been considered sufficient to render the security void in *Brown v. Fulby*, 4 Leon. 45, though it must be admitted that in both these latter instances, the securities appear to have been tainted with usurious reservations, as well as usurious takings. Nevertheless, the case of *Addington v. Cann*, and the perspicuous wording of the statute, combine to engender a very serious doubts of the authority of this part of his Honor's judgment in *Jennings*, *Ex parte*. The consequence also, to which such a doctrine would lead, may be urged against its adoption; for that part of the statute which establishes the penalty of treble the money, would virtually be evaded, if

Taking usurious interest, does not render security void. Sed qu.

Of interest on mortgages of colonial property.

It is said to have been held by Lord Hardwicke (b), that if a contract were made in England for a mortgage of a plantation

- (b) *Stapleton v. Conway*, 3 Atk. 727. *Pierson v. Garnet*, 2 Bro. C. C. 38. 1 Ves. 428. [S. L. as to wills and settlements. *Phipps v. Anglesea*, 1 P. Wms. 696. *Wallis v. Brightwell*, 2 ib. 88. *Saunders v. Drake*, 2 Atk. 465. *Mulcolm v. Martin*, 3 lb. 50. 2 Madd. Ch. 82, and 2 Fonbl. 433, 5th edit.—Ed.]

the mortgagee were allowed to recover his mortgage-money after he had incurred the forfeiture, since he would then in reality forfeit only double the amount taken, being indemnified, by receipt from the mortgagor of the money advanced, as to the other one-third.

Now that we are on the subject of usury, it may not be amiss to run through the leading rules on that branch of law, as far as they elucidate the object of this Treatise, especially as the learned author has, in no part of his work, introduced that head, except in the above two paragraphs in the text, and in his concluding remark at the end of this chapter.

Usury defined and exemplified.

Usury is taking more than the law allows upon a loan or forbearance of a debt. *Spurrier v. Mayoss*, 1 Ves. jun. 531. To constitute usury, there must be either a direct loan, and a taking of more than legal interest for the forbearance of payment, or there must be some devise for the purpose of concealing or evading the appearance of a loan, when in truth it is such. *Barclay v. Walsley*, 4 East, 57. Thus, where A. lent B. 500*l.* and at the time of the loan it was agreed that the latter should give something more than legal interest as a compensation, but no particular sum was specified, and after the securities were executed, and the money paid, the parties went together to another place, where B. offered A. 50*l.* who directed him to give it to his son then present, which was accordingly done, and then B. paid interest at the rate of 5 per cent. on the 500*l.* for five years, at the end of which time an action was brought against A. for usury; it was held, that the action was not barred by lapse of time, for that the loan was substantially for no more than 450*l.* and consequently the interest at the rate of 5 per cent. on the 500*l.* received within the last year, was usurious. *Scurry v. Freeman*, 2 Bos. & Pul. 381. So, upon a contract to forbear 600*l.* for a year, reserving interest at the rate of 5 per cent. for which a premium of ten guineas was paid in the first instance; it was held that the usury was complete upon the lender's receiving any part of the growing interest within the year; for the party having ten guineas premium in hand, and interest accruing from day to day, when he actually received interest, as such, for half a year, he received, upon the whole amount, more than lawful interest for that time upon the sum lent. *Wade v. Wilson*, 1 East, 195.

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Usurious transactions by means of lease, while in fact it is a loan.

It is immaterial in what shape the profit upon the money lent is to accrue; it is sufficient that such profit should exceed the legal rate of interest, in order to bring the transaction within the statute. Therefore, "if a man desire to borrow of me 100*l.* for a year, and I am content to let him have it for legal interest, but withal compel him to take a lease of me of a house at 60*l.* rent, which, in truth, is not worth 30*l.* this contract is usurious." *Sanders's case*,

in the West Indies, no more than legal interest might be paid; and that a covenant, in such mortgage, for payment of 8 *per*

Shep. Touch. 62. And, generally, it may be added, where a loan of money is made in consideration of a lease, and an available security is given for it, the dealing will be usurious. *Wilton v. Brown*, 1 Ball & Bea. 128. Illustrative of this doctrine, the case of *Doe v. Gooch*, (3 Barn. & Ald. 664) may be cited. There, a builder having taken ground on a building lease, at the ground rent of 108*l.*, assigned over his lease to A. for a sum considerably exceeding the then value of the premises, and at the same time took a lease from A. at the increased rent of 395*l.* and containing the same covenants for building as the original lease, together with a stipulation that he should be allowed to re-purchase the lease at the same sum for which it was assigned; the Court of King's Bench held, that under these circumstances it was properly left to the jury to say whether this was a purchase or an usurious loan, and the jury having found it to be the latter, the court refused to disturb the verdict. See the Index, tit. "Lease and Loan," for more on this subject.

We have seen (ante, 297, in *notis*) that a mortgagee will be allowed all his costs and expences, but that if he (being in possession) take a commission or salary for his trouble in collecting the rents, it will be considered as a mere subterfuge for the receipt of usurious interest, and he will be liable accordingly. *Scott v. Brest*, 2 T.R. 238. But there is a case in Maule & Selwyn's Reports, which seems to account the reservation of a stipulated sum, beyond the interest for forbearance, as lawful, where it is in consideration of the performance of trusts, which are tedious and difficult; and, therefore, though generally a mortgagee with trusts for sale in case of default, will not be allowed any sum for his trouble in attending the sale and executing the trusts, yet it is possible, that on the authority of the case alluded to, courts of law might not esteem a reservation in a mortgage deed, containing such trusts for sale, that the mortgagee shall be allowed some advantage for the extraordinary trouble which it is likely will attend the sale and execution of the trusts, to be usurious and void.

Mortgagee taking commission for his trouble, usury.

The case in Maule & Selwyn's Reports was this:—On a contract for the sale of timber, an indenture was executed, whereby the timber, part growing and part felled, was assigned to the plaintiffs upon certain trusts for securing to themselves, out of the proceeds, the re-payment of the purchase-money advanced by them, and also of a certain balance before due to them, together with the interest thereon at 5 *per cent.* up to the time of payment; and the deed contained a covenant that it should be lawful for the plaintiffs to retain a further sum of 200*l.* for a reasonable profit and compensation for the trouble they would be at in the business, and also all costs, charges, damages and expences, which they might be put to on account of the premises. Lord Ellenborough said, the question was, whether this indenture was usurious, and if it appeared on the face of it, from a fair construction of all its parts, that the 200*l.* allowed to be retained as a compensation for trouble was in reality only to be allowed in extension of the interest for the loan, it would amount to gross and indubitable usury. But, looking to the trusts of this deed, his Lordship thought there was a considerable share of

Case where mortgagee was allowed reservation for trouble; trusts being for sale, and otherwise responsible and difficult.

cent. interest, would be within the statute of usury, notwith-

trouble imposed upon those who were to carry the trusts into effect, which entitled them to some compensation, and that to a considerable amount beyond the interest reserved; and although a special provision was made for reimbursing them all costs, charges, damages, and expences which they might be put to, yet that was to be confined to expences incurred by them in the cutting down and felling the timber; which might be going on for three years, but still there might be other sources of expence incurred by them, which would not properly fall under either of those heads. For instance, a portion of the labour and time of their clerks and servants, who, probably, were persons paid by the year, would be occupied in keeping the accounts; a waste of books would also be incurred, besides an occasional attendance and trouble of the plaintiffs themselves to inspect the accounts, which would only be satisfied under the 200*l.* But in order to support a charge of usury, it ought to appear clearly that the payment stipulated for, is either colourable and frivolous in its nature, or excessive in its amount. As to its being frivolous, from the observations already made, Lord Ellenborough could not say that some compensation was not due, because it would require considerable personal trouble for three years, and with respect to its being excessive, his Lordship had no scale nice enough to balance the trouble which was imposed upon the plaintiffs in carrying the deed into execution, with the amount of the compensation agreed upon, so as to convince him that it was so much beyond an equivalent as to be necessarily usurious, and without some proof of that sort (which proof laid with the party who alleged the usury), the compensation was a fair one, and the instrument valid. *Grose, Le Blanc, and Bayley, Justices*, agreeing with his Lordship, it was adjudged, that the above transaction was not usurious. *Palmer v. Baker*, 1 Maul. & Selw. 56.

Lender to have salary as steward or clerk, and perform no service, usury. Where a mortgagee procured the mortgagor to appoint him steward of a manor, the grant of the stewardship was set aside on the ground of imposition. *Thorncill v. Evans*, 2 Atk. 330. And where there was an agreement by the borrower to allow the lender a salary as a clerk in his brewery, which would yield him more than 5 *per cent.* on his money, it not being intended that he should perform any services, it was admitted to be corrupt and illegal. *Wright v. Wheeler*, 1 Campb. 165, n. In all such cases, therefore, it is a mere question of fact for the jury, whether the contract was fair and honest, or whether it was intended merely as a cloak for the concealment of an usurious bargain. But if the principal money be really and *bona fide* hazarded, it will not be usury to take more than 5 *per cent.* *Wortley v. Pitt*, 1 Ves. 164. 2 ib. 125. *Anderson v. Maltby*, 2 Ves. jun. 248. On this principle the common annuity transactions with agreements for repurchase, are supported.

Usury a fact for jury.

Contract may be usurious, but penalty not incurred till more than 5 per cent. taken.

If more than legal interest be reserved, the security will be *ipso facto* void under the statute; yet, if the lender do not receive more than legal interest, the penalty will not be incurred. Serjt. Williams's note to *Ferrall v. Sheen*, 1 Saund. 294, 5. And it is observable, that in *Ballard v. Oddey*, 2 Mod. 807, it was ruled, that to avoid a security by reason of usury, the contract itself must be usurious; for if the agreement of the parties be honest, but made otherwise by the mistake of a scrivener, it will not be usury; as if a mortgage

standing this were the rate of interest where the lands lay;

be made for 100*l.* with a proviso for avoiding the same, on payment of 105*l.* at the end of the year, and no covenant be inserted for the mortgagor to take the profits in the mean time, whereby, on the face of the instrument, the mortgagee will appear to be entitled to both the interest and the profits, yet, if this were not expressed, no charge of usury would be incurred.

If a lender sell stock, and pay over the money, and take a security from the borrower, to replace the stock by a certain time, or repay the money, with such interest, in the mean time, as the stock itself would have produced, the transaction will not be usurious, though the interest exceed 5 *per cent.* *Tate v. Wellings*, 3 T. R. 531. Yet, in such case, if the choice of paying the money, or replacing the stock by the time appointed, depend on the will of the lender only, the security will be clearly void as usurious; because the lender will by that means be sure of his interest at 5 *per cent.* with a chance of its increase by a rise in the price of funds, and to stipulate for that chance is usury. *Barnard v. Young*, 17 Ves. 44, a case which, on review in the Court of King's Bench, has been pronounced to be rightly decided. 3 Barn. & Cres. 276. So where the lender of stock reserved to himself the dividends by way of interest, and the option of deciding at a future day whether he would have the stock replaced or the sum produced by the sale of it repaid to him in money with 5 *per cent.* interest; it was held that this bargain was usurious, and that it made no difference whether the whole of the agreement was contained in one instrument, or whether the lender procured the execution of two instruments, by one of which he might compel the replacing of stock, by the other the payment of the money and interest. *White v. Wright*, 3 Barn. & Cres. 272. *Barnard v. Young*, 17 Ves. 44. In a case where A. agreed to lend B. 1000*l.* and for that purpose sold 1000*l.* stock, which, being under par, produced only 923*l.* and afterwards lent him a farther sum of 1400*l.* part of which being sold out in like manner, produced only 1132*l.* and took mortgages for two sums of 1000*l.* to 1400*l.* at 5 *per cent.*, in the former instance, with a covenant to reduce the interest to 4 *per cent.* on punctual payment; in the latter case, with a power to the borrower to replace the stock within two years, it was held by Lord Northington, on a bill brought by A. for a foreclosure, (the whole money having been allowed in the account computed by the Master,) that the transaction was usurious, and that equity would relieve, though the money had been paid, and the decree of foreclosure *nisi*, made absolute. *Moore v. Battie*, 1 Eden, 273. S. C. Amb. 371. But it should be observed, that a creditor who takes a security for the transfer or investment in his name of a certain quantity of stock, fixing the amount of the stock by what the debt would have purchased, according to the market price of the day on which the security is taken, with such interest, in the mean time, as the stock would have yielded, if purchased, will neither be guilty of usury under the 12 Anne, nor come within the prohibition of the Stock Jobbing Act of the 7 Geo. 2. c. 8. *Maddock v. Rumball*, 8 East, 304. *Sanders v. Kentish*, 8 T. R. 162. 2 Esp. 698. It remains to remark on this head, that the Usury Acts (particularly that of the 8 Anne, st. 2. c. 16) apply to loans of money's worth as well

Taking dividend on stock not usury, when.

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[for that if the courts in England were to suffer a mortgage to

as of money itself. *Parker v. Rambottom*, 3 Barn. & Cress. 270. See further as to mortgages of stock, *infra*, Ch. XXII. a. 4.

Bankers commission, though accompanied with mortgage, not usurious.

The usage of country bankers in discounting bills of exchange, to receive over and above the common interest of 5 per cent. for the time the bills have to run, the further sum of 5s. per cent. on the gross sum for commission has been held to be legal. *Winch v. Fenn*, 2 T. R. 52, n. *Hammatt v. Yes*, 1 Bos. & Pul. 144. *Caliot v. Walker*, 2 Anstr. 495. *Auriol v. Thomas*, 2 T. R. 52. And a mortgage taken to secure a reasonable commission beyond legal interest for extra-incidental charges, as upon agency in the remittance of bills, has also been held to be free of usury. *Baynes v. Fry*, 15 Ves. 120. So, the acceptor of a bill of exchange, dated 4th July, and due 7th September, taking a premium of six-pence in the pound from the indorsee and holder, for payment of the bill on the 30th of August, before it was due, has been held not guilty of usury; there being no loan or forbearance. *Barclay v. Walsley*, 4 East, 55.

Before mortgagor can be relieved against usurious contract, he must tender money actually advanced.

If a plaintiff in equity pray that an instrument or security given for usurious consideration, be delivered up to be cancelled, the only terms upon which equity will interpose, are, the plaintiff's paying to the defendant what is really and bona fide due to him. *Scott v. Nesbitt*, 2 Bro. C. C. 649. And if the plaintiff do not make such offer by his bill, the defendant may demur; whereas if the party claiming under such instrument come into equity to render his claim available, the court will proceed upon the letter of the statute. 1 Fomb. Trea. Eq. 23. And it is now settled, that before a party can entitle himself by a civil action to relief from an usurious contract, he must tender all the money really advanced. *Fitzroy v. Gwillam*, 1 T. R. 153. But the court will set aside a judgment founded on an usurious security, without compelling the defendant to repay the principal and interest. *Roberts v. Goff*, 4 Barn. & Ald. 92. And if a mortgagor, on an usurious contract, pay the money, he may afterwards in equity recover the surplus beyond the legal interest, though the payment were made under a decree of the Court of Chancery. *Moore v. Battie*, *ubi supra*. *Boanquet v. Daskwood*, Ca. temp. Talb. 38. *Smith v. Bromley*, Doug. 697 b.

Mortgagee's security when void, so as to extinguish his debt.

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On the other hand, if an usurious security be given for a legal subsisting debt, although the security be void, the debt will not be extinguished. *Phillips v. Cochrane*, 3 Campb. 119, et vide 1 Marsh. 349, and 5 Taunt. 66. In another case it was said, that where usurious securities have been acted on, and the money partly paid by the borrower, the Court of Common Pleas will not set aside a judgment and execution but upon the terms of the defendant repaying the principal and legal interest. *Hindle v. O'Brien*, 1 Taunt. 412. And after usurious securities given for a loan have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest will be binding. *Barnes v. Hadley*, 2 Taunt. 184. But where a former account and usurious interest founded thereupon had been settled, and new bills given for the balance due, this was held still unavailable as a security, even for the interest really due, *Presden v. Jackson*, 2 Stark. 237; for a substituted

be made at the interest money carried in the plantations, that method might be taken to avoid the statute of usury (E).—*Ed.*]

security generally stands in the same situation as the original. *Chapman v. Black*, 2 Barn. & Ald. 588. So a security given in lieu of a former security, which was tainted with usury, is void; unless, in the second security, a deduction is made of all sums paid usuriously under the former security. *Wickes v. Gogerley*, 1 Carr. 396. S. L. 1 Ry. & Moody, 123. Nevertheless, where a promissory note was given for repayment of a sum lent, with usurious interest, and the note, when due, was taken up, and another note substituted for it, the offence of usury was not, it was held, thereby committed, nor was the penalty incurred until the latter note were paid. *Maddock v. Hammett*, 7 T. R. 184. And it is observable, that a *bond fide* debt will not be destroyed by being mingled with an usurious contract relating to it. *Gray v. Fowler*, 1 Hen. Bla. 462.

In cases of bankruptcy the lender of the money upon usury can have no relief in equity under the commission, though Lord Hardwicke has said, that in his time it had often been attempted. *Skipp, Ex parte*, 2 Ves. 489. In a recent case Lord Eldon laid down these distinctions:—Suppose a mortgage contract to be usurious, the creditor coming to prove in the ordinary proceeding, every other creditor, or even the bankrupt, might present a petition, which he has a mode of verifying that is not open to him upon a bill, the court, upon his affidavit stating the usury, putting the creditor to answer, upon a principle quite different from that which obtains in a suit; for the plaintiff, in a bill, could not offer to redeem without paying what was due: but by the jurisdiction in bankruptcy upon a petition, supported by the oath of the party interested, unanswered, the security is cut down altogether; not leaving the party a creditor, even for what was actually advanced. *Benfield v. Solomons*, 9 Ves. 84. When a security is tainted with usury, the court will, in the first instance, decide upon that without directing an inquiry before the commissioners, or an issue, per Sir Thomas Plumer, V. C. in *Jennings, Ex parte*, 1 Madd. Rep. 337. The venue in an action for usury must be laid where the usurious interest is received. *Pearson v. McGowan*, 3 Barn. & Cress. 700. For further information on the subject of usury, the reader may consult Puffendorff's Law N. & N. lib. 5. c. 7. s. 8. p. 506, Barb. ed. 1 Domat's C. L. lib. 1. tit. 6. p. 121, Strahan's edit. 1 Fonbl. Trea. Eq. 139. 239, 5th edit. and the respective Treatises of Messrs. Plowden, Ord, and R. R. Comyn.

(E) But this distinction appears on the cases, that although the contract for a mortgage might be made in England, yet if the mortgage were really executed in the country where the lands lie, the local rate of interest would be allowed; see *Connor v. Bellamont*, 2 Atk. 381. *Champant v. Ranelagh*, Pr. Ch. 128. S. C. 2 Vern. 395; and *Bodily v. Bellamy*, 2 Burr. 1094. The learned author of the Treatise of Equity thus considers the point:—"As to the measure of the computation of interest, it is to be observed, 1st. That contracts are to be adjudged according to the law of the place where such contracts are made, and therefore, in all cases, interest must be paid according to the law of the country where the debt was contracted, and not according to that

Effect of bankruptcy on usurious mortgage.

Mortgage made in foreign country bears rate of interest allowed there.

But 6 per cent. allowed on Irish and West India mortgages made in England.

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But now this point is settled by the 14 Geo. 3. c. 79. s. 2, whereby it is enacted, " That none of his majesty's subjects, " in Great Britain, shall be subject or liable to any of the " penalties or forfeitures inflicted by the 12 Ann. by receiving, " or taking interest for, any sum or sums of money, really and " *bonâ fide* lent on any mortgage, &c. of lands in Ireland, or " in the colonies or plantations in the West Indies, *the securities for which are made and executed in Great Britain*, so " as the interest, so to be received or taken, do not exceed the " rate of six pounds for one hundred pounds for a year." (F)

where the debt is sued for. So where one living in England devises a rent-charge out of his estate in Ireland, it shall be reckoned according to the English value, the will being made here. So Turkish and Indian interest is allowed upon contracts made there, though both parties have been long in England. Yet it is but reasonable, where the money is to be paid here, that the party should have an allowance for the return of it." Trea. Eq. lib. v. c. 1. s. 6. See also Huber Prælect. 2 tom. lib. i. tit. 3. *de conflictu legum*.

Stat. of Geo. 3. rendering valid mortgages of Irish and colonial property at 6 per cent. executed in England.

(F) By the first section of this act, all securities made *previously* to the passing of the act (1774) are rendered valid, and the established rate of interest of the particular place is allowed to be taken on such securities. By the second section, all *future* securities of the like kind, and also all bonds and covenants for payment of the same monies are likewise made effectual, provided the interest to be *received or taken* does not exceed 6 per cent. The third section declares, that the act shall not make valid securities, where it shall be known to the lender at the time of his advancing his money, that the loan exceeds the value of the property comprised in his mortgage. The fourth section enacts, that every person borrowing any sum under the act, exceeding the value of the property above all incumbrances at the time of such borrowing, shall forfeit treble the value of the sum borrowed, one half to the informer, and the other half to the treasurer of Greenwich Hospital. The fifth and last section provides, that all securities under the act shall be registered where the property lies within the time limited by the laws of the place; otherwise, that the same shall be subject to the penalties of the statute of usury of the 12 Anne, unless the mortgagee shall have used his utmost endeavours to cause the same to be registered within the time limited by the act.

Statute does not extend to ease where more than 6 per cent. is reserved.

This statute having made effectual all securities of Irish and Colonial property, where the interest *received or taken* does not exceed 6 per cent., it should seem to follow, that where *more than 6 per cent. is reserved* on such security, is a case without the statute, and such as must be governed by the law which existed previously to the passing of the act. The consequence is, that Lord Hardwicke's rule in *Stapilton v. Conway* still holds where the interest reserved exceeds 6 per cent., and that though such higher rate of interest may be tolerated where the lands lie, yet if the mortgage be executed in England the penalties of the act of Queen Anne will be incurred.

But it seems that this statute, being an enabling act, extends only to the particular cases therein mentioned, and does not reach any others. Now it enacts, that mortgages and other securities respecting *lands* in Ireland and the West Indies, reserving interest allowed in those countries, shall be valid, though executed in England; but does not mention personal contracts; if so, a bond taken together with such mortgage, reserving greater interest than is allowed by the laws of this country, will, it should seem, be void *as usurious* (G).

Though bond of such property at 6 per cent. void. Semb.

No case has, as yet, been decided on this question, in relation to a mortgage; but where a bond was given in England for 2800*l.* with a condition (c), which (after reciting an agreement made in June, 1769, between A. and B. for the purchase of an estate in St. Christopher's, by the former of the latter for 1800*l.*; and that it was agreed, *at the making of that contract*, and it was part of the terms thereof, that 1400*l.* part of it should remain secured by a joint bond of A., and another person to be in that behalf appointed, and who was resident in England; in consequence of which, he, together with H.,

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Bond in England at 6 per cent. for purchase-money unpaid of estate in West Indies, void.

(c) *Dewar v. Spun*, 3 T. R. 425.

(G) This case is particularly excepted in the act of 14 Geo. 3; and, therefore, though a bond or covenant, as a substantive security, whereupon interest at 6 per cent. is reserved, may be void as usurious (3 T. R. 425), yet such a bond or covenant when taken as a collateral security will be good; see 14 Geo. 3. c. 79. s. 2.

Bond as collateral security, good,

It has been lately doubted, whether a bond or covenant, entered into by a third person for further securing the mortgage money, be comprehended within this latter exception of the statute. To obviate this difficulty, an act of the last session was procured, whereby all bonds and covenants which have been, or which, after the passing of the act, shall be made and executed in Great Britain, either by the person borrowing, or by any other person or persons, either residing in Great Britain or elsewhere, by way of collateral security to any mortgage, security, or transfer of mortgage of lands, tenements, slaves, cattle, or other things, lying in Ireland, or any of his majesty's colonies, are rendered as valid and effectual to all intents and purposes, as if made and executed in the country where the lands lie; and it is declared, that none of his majesty's subjects in Great Britain shall be liable to the penalties and forfeitures of the act of Queen Anne, by receiving or taking, or having received or taken interest for monies really and *bond fide* advanced on any such mortgage security, bond, covenant, or transfer, so as the interest to be received or taken on such bond, covenant, or security, do not exceed 6*l.* per cent. per annum, 1 & 2 Geo. 4. c. 51.

Though given by third person.

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became bound to B. for the 1400*l.*, with interest at 6*l. per cent.*; and also reciting that it had been since proposed and agreed between A. and D. B., son of B., then deceased, that the former bond should be cancelled, and a new bond given for the 1400*l.*, with interest at 6*l. per cent.*, agreeable to the original contract) was, that, on payment of 1400*l.* by A. or S. the co-obligor and defendant, with interest at 6*l. per cent.*, &c. the bond should be void; on a plea to an action brought thereupon, that after the 29th of September, 1714, and after the death of D. B.'s father, and before the making of this bond, it was, corruptly and against the form of the statute, agreed between D. B. and A., that the bond so entered into by A. and H. should be cancelled, and that D. B. should forbear and give farther time of payment of the sum of 1400*l.* until the 25th of June, 1788, and should for such his forbearance be paid interest on the 1400*l.* in the mean time, after the rate of 6*l.* for every 100*l.* by the year; and that for securing the payment as well of the 1400*l.* as the interest, this bond was given; with an averment that the former bond was given up to be cancelled by means, &c. the present bond was void; it was held by the court of King's Bench, unanimously, to be void, *on the ground of usury* (H).

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Statute of Anne
not retrospec-
tive.

But the statute of Queen Anne [which passed in the year 1713] has no retrospect to contracts made previous thereto; for they may carry interest according to the interest allowed on agreement, at the time the debt was contracted (*d*) (I).

(*d*) *Walker v. Penry*, 2 Vern. 42. 78. 145. S. C. 1 Eq. Abr. Ca. 288. S. C. contra, Pre. Ch. 50.

(H) *Quære de hoc*, as the money in this case was not secured by a personal contract merely,—it was a lien on the land notwithstanding the bond. *Hearne v. Botelers*, Cary's Rep. 461. *Harrison v. Southcote*, 2 Ves. 389; and therefore it should seem to be a case within the statute.

[900*]

(I) In *Procter v. Couper*, 2 Vern. 377, this rule seems not to have been attended to. There, the Master in taking the account was directed to allow interest at the rate of 8*l. per cent.*, that being the rate of interest at the time the mortgage was made, and he was to allow interest after that rate till the ordinance of parliament, and then interest at the rate of 6 *per cent. per annum* from that time. Reg. Lib. 1699, B. fol. 450. But this case was not exactly on the statute of Anne, nor indeed was that of *Walker v. Penry*, ubi supra. Nevertheless the rule in the text seems to embrace the current opinion. See 2 Fonbl. 447.

A distinction is made in Chancery between an agreement (*e*), that the interest shall be raised if not punctually paid, and for abatement thereof upon punctual payment. For, in the former case, it is considered as a penalty, against which the courts of equity will relieve; but in the latter, as a condition, which must be strictly adhered to; in which case the debtor cannot have relief, in equity, after the day of payment elapsed; because the abatement is to be upon a condition, which is not performed (*f*).

Agreements for rise and abatement of interest distinguished.

Thus (*g*), where (before the reduction of interest to 5 *per cent.*) a mortgagee lent money at 6 *per cent.*, but agreed in the deed, that, if the money was paid within three months after it became due, he would accept of 5 *per cent.* The mortgagor not paying the money within the time, the question was, whether he should pay 5*l.* or 6*l.* *per cent.*? And it was held by the court, that interest must be paid at 6 *per cent.*; for though relief was given against unreasonable penalties, yet this was not so, for the mortgagee might have refused to lend his money under 6 *per cent.*

Agreement that interest shall be reduced on punctual payment, not relievable against in equity.

But where (*h*), on a bill to foreclose a mortgage, the interest, by the deed, was to be 5 *per cent. per ann.* payable half yearly, and if not paid by the space of two months after the time of payment, then to be raised to 5*l.* 10*s.* *per cent. per ann.* for increase of interest. The interest being run greatly in arrear, the question was, after what rate it should be computed on redemption of the mortgage? And it was decreed to be computed at the rate of 5 *per cent. per ann. only*: for, where the interest was to be increased, if not paid at the day,

Sed contra of agreement that it shall be raised (hh).

(*e*) *Bonafous v. Rybot*, 3 Burr. 1375.

(*f*) This distinction holds in all cases of compositions, &c. if the money be not paid at the day, equity will not relieve. 3 Atk. 585. [See observations on this distinction, *infra*, p. 902, n. (M).—Ed.]

(*g*) *Jory v. Cox*, Pre. Ch. 160. *Warmley v. Booth*, Barn. 481. *Nichols v. Maynard*, 3 Atk. 520.

(*h*) *Strode v. Parker*, 2 Vern. 316.

Holles v. Wyse, 2 Vern. 289. *Nichols v. Maynard*, 3 Atk. 520.

(*hh*) [This distinction was admitted and acted on by Lord Northington in *Stanhope v. Manners*, *infra*, p. 902, n. (M), though his Lordship acknowledged that he could not discover the sense of the rule.—Ed.]

that was but in the nature of a penalty, and relievable in equity (k).

Provided there be no covenant for payment of additional sum.

But it seems, that if there be a covenant for payment of the additional 1 *per cent.*, the court will not relieve against it.

Thus (i), where money was lent on mortgage at 5 *per cent.* and the mortgagor covenanted to pay 6 *per cent.* if he made default in payment of interest for the space of sixty days, after the time of payment, the court decreed, that, from default made, the mortgagor should pay 6 *per cent.* (k); for that this covenant was the agreement of the parties, and not to be relieved against as a penalty. *Quære*, if such covenant must not be in a separate deed, though I should think that would make no difference (l).

But agreement to raise interest in default of payment not relieved against, if arrears accrue by reason of mortgagor's desiring forbearance, and promising to make satisfaction.

And, if an indulgence be given by the mortgagee, such agreement will be good to raise the interest, upon the ground of forbearance; such additional interest not being considered, in that case, as a penalty, but as a liquidated satisfaction fixed and agreed upon by the parties. So, where a mortgage was given, in Ireland (j), to trustees, by way of securing debts to creditors, and no money actually passed, but the sum nominally lent was to be paid by instalments; an agreement that the interest of those sums should rise, on non-payment, at the time appointed, or within three weeks after, from 5 to 8 *per*

(i) *Halifax v. Higgins*, 2 Vern. 134.

(j) *Burton v. Slattery*, 2 Bro. P. C.

(k) Pre. Ch. 161. Vide *Howard v.* 68.

Harris, ante, 684.

(K) The reporter reasonably adds "*Quare tamen*, for the agreement of the parties seems to be the same in either case, and whether interest is to be reduced upon compliance with the terms of payment, or to be advanced in default thereof, seems only to be a difference in expressing one and the same thing." See 2 Vern. 317; et vide further, 902, 3, *infra*, in *notis*.

Halifax v. Higgins said to be over-ruled.

(L) This certainly can make little difference. The stipulation in the covenant must be considered as fixing the amount of damages to be recovered, against which a court of equity will not relieve; then whether the covenant be in the same or in a distinct instrument, cannot form a ground for a different rule. This case of *Halifax v. Higgins* is generally considered as misstated, to say the least of it; and in 1 Eden, 199, n. (a), it is said to be over-ruled, as is also *Brown v. Barkham*, *infra*, n. (m), next page, on the same point.

cent. was held good, upon an appeal to the House of Lords. And, in a similar case (*m*), where a long arrear of interest had accrued, and the mortgagee had sent an account thereof to the mortgagor, who returned an answer, admitting the account, *desiring forbearance*, and promising to make satisfaction for the same. Lord Chancellor Parker allowed the additional 1 *per cent.* reserved as a satisfaction; saying, that though the proviso, obliging the party to pay 6 *per cent.* was generally looked upon as a penalty, and *in terrorem*, and therefore to be relieved against, if only a very short lapse had happened; yet it might not be relievable against, in case of a long arrear of interest; and that if no reservation of 6 *per cent.* had been made, and a great arrear of interest had incurred, the court, on such a promise, in writing, to make a satisfaction for forbearance, would have given the mortgagee some allowance in that respect. We must observe, in this case, that the *mortgagee had, originally, made himself judge* what recompence he should have, in case the agreement for payment of interest was not performed, and the *mortgagor had acquiesced* therein; and therefore there would have been no equity in the court interfering to alter it (*M*).

[902]

(*m*) *Brown v. Barkham*, *infra*, 916, additional 1 *per cent.* See 1 Eden, [over-ruled as to the allowance of the 199, n. (a), and note (L), *supra*.—*Ed.*]

(*M*) The distinction here treated of, between a mortgage at 5 *per cent.* with a clause for reduction to four if the interest be regularly paid, and a mortgage at 4 *per cent.* with a clause for enlargement to five if the payment of interest be deferred, is instanced by Sir W. Blackstone as a plain positive rule of law, supportable only by the reverence which is shewn, and generally very properly shewn, to a series of former determinations, that the rules of property might be uniform and steady; 3 Bl. Com. 432. It is difficult to comprehend the reason of the distinction—the difference between the cases existing merely in expression not in substance; see *ante*, p. 901, n. (K). In *Stanhope v. Manners*, 3 Eden, 197, the sum of 10,000*l.* was borrowed with interest at 5 *per cent.* The mortgage deed contained a provision, that as often as the interest should be paid half yearly on certain days therein specified, or within three months next after each of the said days respectively, the sum of 62*l.* 10*s.* should be abated from every half year's interest, and interest after the rate of 3*l.* 15*s.* for every 100*l.* should then be accepted by the mortgagee in lieu and satisfaction of the interest agreed to be paid at 5 *per cent.* in manner thereinbefore mentioned. This covenant drew from Lord Northington, C. the following remarks: “It has been truly said, that the authority of this court has assumed in cases of mortgages the old physical maxim *forma dat esse*, and

Distinction between agreements for rise and abatement of interest, stated and confirmed.

All money paid by surety bears interest.

It is a rule and course of the Court of Chancery, on reference to a Master to state an account upon a mortgage (n), that

(n) *Morley v. Elwis*, 2 Keb. 576.

One default not a forfeiture of whole covenant.
[903 *]

that if the interest once runs at the larger rate, it shall not be abated, unless you hit the bird in the eye, and pay or tender, within the precise time; that, on the other hand, if it runs at the lower rate, it shall not be raised even on a gross default, though, in fact, the substantial reasonable agreement between both parties is, if you are punctual to the time agreed upon, you shall pay less than if you delay and put me to an inconvenience. I believe all authorities sensibly founded, but I never heard or could myself discover, the sense of the distinction. But that is not the present case, for this is a special agreement, and words cannot be stronger to express the intent of the parties, that in every instance, when the time has been neglected, the abatement shall not be accepted; and in every instance, when the $3\frac{1}{4}$ per cent. has been tendered in time, that it shall be accepted; and this seems a fair circumstance attending an agreement of time, and the contrary opinion would be very dangerous, viz. that one default should run through the whole term." Lord Northington then proceeded to investigate other bearings of the case, and held, on the point under consideration, that inasmuch as the first half year's interest had not been tendered until after the expiration of the three months, but that the second half year's interest had been tendered before the expiration of that time, that the mortgagee was only entitled to interest at 5 per cent. for the half year which had been tendered after the stipulated period.—From this case we infer, 1st. That one default in payment of the reduced rate of interest at the specified time will not operate as a forfeiture of the mortgagor's benefit to the covenant in future, but that if he afterwards tender the subsequent interest at the time appointed, he will save the penalty for that payment; and, 2d. That if interest be secured at 5 per cent. with a covenant for abatement on regular payment, the court will not relieve the mortgagor if he omits to tender the lesser rate of interest at the time agreed on, which is in direct confirmation of the case of *Jory v. Cox*, ante, 900, and of the distinction we are now considering. But if mortgage money be secured to be paid by instalments, and also by a warrant of attorney, the condition of which is, that no execution shall be issued until default is made in payment, one default will entitle the mortgagee to take out execution for the whole money; for, per Dampier, J. "I doubt much if, in point of law, the party could take out a second execution" for the same debt. *Leveridge v. Forty*, 1 M. & S. 706.

Obiter opinion of Lord Eldon, that court will relieve, whether interest be at 5 per cent. with condition to take four, or whether it be at four with condition to have five, if not re-

In an obiter opinion of Lord Eldon, in *Seton v. Slade*, 7 Ves. 273, this distinction is entirely disregarded; but it should be observed, that his Lordship does not allude to the exact case, but merely adduces a general principle to prove that time is not viewed in equity as of the essence of an agreement as it is at law; so that the Court of Chancery will in given cases relieve against the penalty of a condition, if the thing agreed to be done be afterwards performed, and reparation be made to the party for any loss he might have sustained in the interval. On this view of the case, little can be inferred from his Lordship's observations decidedly hostile to the doctrine in the text (900);

all money paid as surety, shall be reckoned as principal money from the time of payment, and interest allowed thereupon accordingly (N).

So, likewise, the practice is (o), that if the mortgagee assign the mortgage, with the concurrence of the mortgagor, *all money, really paid by the assignee, that was due to the mortgagee, shall be considered principal, and that the assignee shall have interest upon the interest then due, and paid by him, as well as upon the principal originally lent.* *So of all money really paid by assignee, if mortgagor concurs in transfer (o).*

(o) *Smith v. Pemberton*, 1 Ch. Ca. man, 2 Vern. 135. Bac. Abr. 658.—
67, 68. Ibid. 258. [S. C. 2 Freem. Ed.]
184. 1 Vern. 169. *Gladman v. Hench-*

for it is more than probable that Lord Eldon would, on a review of the cases, rather qualify his general expressions in *Seton v. Slade*, than over-rule a doctrine which appears to have been so long and so permanently established. The following were the remarks of his Lordship: "I only say time is not regarded here as at law; as in the instance of a mortgage with interest at 5 per cent. and a condition to take four if regularly paid, or at 4 per cent. with a condition for five if not regularly paid. At law you might in that case recover the 5 per cent.; for it is the legal interest. But this court regards the 5 per cent. as a penalty for securing the four, and time is no farther of the essence, than that if it is not paid at the time, the party may be relieved from paying the 5 per cent. by paying the 4 per cent. and putting the other party in the same condition as if the 4 per cent. had been paid, that is, by paying him interest upon the 4 per cent. as if it had been received at the time. So, in this court, before courts of law dealt with a bond under a penalty, as they do now, time was of the essence there, but this court relieved against the penalty long before a court of law, and there are many other instances." 7 Ves. 273. As to the materiality of time with respect to the performance of agreements, see *Lloyd v. Collett*, 4 Bro. C. C. 469, Mr. Sander's note to *Gibson v. Paterson*, 1 Atk. 12; and *Harrington v. Wheeler*, 4 Ves. 686.

(N) "But *quare*, whether the rule extends to payment by a stranger, without the concurrence of the debtor?" 2 Fonbl. 438. 5th edit. If a conjecture may be hazarded where Mr. Fonblanque appears to be in doubt, it is conceived to be probable that this question would be decided in the negative.

(O) And here we may remark as a general rule, that the assignee succeeds in the place of a mortgagee, and may exercise the rights which are made over to him in the same manner as the mortgagee might have done himself before the assignment was executed. It was so in the civil law; see 1 Domat. 377; but with reference to the case in the text it should be remembered, that without the concurrence of the mortgagor an arrear of interest cannot be converted into principal, and therefore, that in all instances of transfer it is desirable (though not absolutely necessary) to make the mortgagor a party if his consent can be procured. *Effect of transfer.*

And assignment be not colourably made.

But it is otherwise (*p*), if the assignee hath not paid the money, and the assignment be only colourable, in order to load the mortgagor with compound interest.

Mortgagor not bound by account between mortgagee and assignee, if no party to transfer (r).

The account between the mortgagee and assignee will not conclude the mortgagor, where the latter is not party or privy to the assignment (*q*). Thus where (*r*), upon the assignment of a mortgage, the debt was stated between the assignee, the mortgagee, and some of the co-heirs that were looked upon to have a right to the redemption; it was insisted, that this ought to conclude the plaintiff, who claimed as devisee under the will of the mortgagor, as a stated account: but he being no party thereto, that was over-ruled by the court.

Assignee of mortgage takes subject to account between original parties (s).

Another case (*s*), illustrative of the practices as to the inconclusiveness of the account between the mortgagee and assignee of the mortgage, occurred lately. The substance of the case was stated in the judgment which was given by Lord Loughborough, Chancellor, with which I have been favoured. His Lordship said, "the question was, whether the assignee of a mortgage had a right to be paid according to the sum appearing due on that mortgage, whatever might have been the state of accounts between the mortgagor and mortgagee. The circumstances of the case had nothing in them so particular as to vary the general question. M. had created a mortgage on his estate, on which S. had advanced some money as being his

(*p*) 1 Ch. Ca. 68. 1 Eq. Ca. Abr. 329, pl. 1.

(*q*) Vide supra, [and the notes there, pages 152 to 154, and infra, 953, 4.—Ed.]

(*r*) *Earl of Macclesfield v. Fitton*, 1 Vern. 168, infra, 909. 1 Ch. Ca. 68.

(*s*) *Matthews v. Walwyn*, Shep. and Co. Lincoln's-Inn Hall, August 6th, 1798. [S. C. 4 Ves. 148, and ante, vol. i. 154.—Ed.]

(*ss*) [S. L. *Chambers v. Goldwin*, 9 Ves. 264.—Ed.]

Law in text confirmed.

(P) In a recent case, Lord Eldon said, it was settled that if an assignment of a mortgage is taken without the intervention of the mortgagor, whatever the assignee pays, he can claim nothing under the assignment but what is actually due between the mortgagor and mortgagee; and his Lordship thought that rightly settled. He added, that he should not have made this remark, but that he knew Lord Kenyon entertained a doubt of Lord Rosalyn's decision in the above case of *Matthews v. Walwyn*. See *Chambers v. Goldwin*, 9 Ves. 264.

attorney. The purpose of creating that mortgage was, that money might be raised for the use of M. The sum that was actually paid by S. to M. did not go to the whole extent of it, because by subsequent dealings, that sum which was actually paid by S. to M. was in fact reduced. S. ought not to have made any use of that mortgage, but to have raised money on it for the use of M. But S. thought fit to make an assignment of this mortgage, and the assignees of the mortgage claimed to hold it to the full extent of the sum appearing due on the face of the mortgage deed." When this case was agitated before his Lordship, a case was referred to, in which it was supposed my Lord Thurlow had entertained, not decided, but it was intimated that he entertained an idea, that if a mortgagor had permitted the mortgage deeds, without any indorsement, to be in possession of the mortgagee, an assignee taking under that mortgagee, might have a right to hold the mortgage to the whole extent of the sum appearing due on it against the mortgagor. It was also stated, that in practice it was supposed that persons dealing in such securities were bound to know the mortgagor, though *that* in some cases might be difficult; and that the assignee of a mortgage was bound to settle accounts, as the person would have been from whom he took the assignment.

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"I thought it material to get such information, as one can, in inquiries of this kind, with respect to the practice; and I believe the general result is this, that persons most conversant

Assignment of mortgage should always be with mortgagor's privity (q).

(Q) In *Williams v. Sorrell*, 4 Ves. 389, A. made a mortgage to B. for 300*l*. B. without the knowledge of A. assigned this mortgage with other property to C. for securing 600*l*. and interest, with assignment (the premises lying in Middlesex) was duly registered. About a year after this assignment, A. paid B. 100*l*. on account of the principal, and 14*l*. 10*s*. for interest due on the mortgage, the receipts for which sums expressed the former, to be "in part of 300*l*. secured by mortgage," and the latter to be "for interest due at Lady Day next." A few months after, he paid to B. the further sum of 100*l*. on account of the said principal money, the receipt of which expressed that payment to be "in part of 200*l*. due upon the mortgage." B. became bankrupt, and in July, 1797, the assignee of the mortgage filed a bill for foreclosure; charging, that the registry of the assignment was notice to the mortgagor. In September, of the same year, the money remaining due for principal and interest was tendered on the part of the defendant to the plaintiff and refused. The

After assignment of mortgage without notice to mortgagor, payments to mortgagee bind assignee. Registry no notice for this purpose.

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in conveyancing hold, that it is extremely unfit, and very rash, and a very indifferent security, to take an assignment of a mortgage without the *privity* of the mortgagor, from whom he might learn the sum really due on it. In fact, the assignments of mortgages are sometimes made without calling on the mortgagor, but in these cases the assignments are taken as the best security a man can get for a debt not very well secured, or in the course of transactions for raising money on such slender securities as they can find it. But I understand, among conveyancers, no gentleman of established practice would recommend to take as a title, and as a good title, the assignment of a mortgage, without making the mortgagor a party *privy* to that assignment, and without being *satisfied from him* of the money that is really due on the mortgage (R). With respect to a case that was quoted, I believe, from the circumstances, of the first order, there might be some doubt expressed at the time on the point. The name of the case to which I allude is *Lunn and others*, assignees of *Lodge*, a bankrupt, v. *St. John*, and some other parties. L. granted a mortgage to P. who made an assignment of it to St. John, for a sum less in

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mortgagor by his answer, denied any notice of the assignment until the 22d of April, 1797, when he was applied to by the plaintiff's solicitor for the whole 300*l.* and interest, and he denied collusion; and prayed costs from the time of the tender. Lord Rosslyn decreed, that the defendant, the mortgagor, should be at liberty to redeem upon payment of what remained due, deducting the payments made to B. with costs to the time of the tender only.

[906 *]

(R) But if the concurrence of the mortgagor cannot be obtained, it is highly essential to take from the mortgagee a covenant that the money alleged to be owing is really due, and to give notice of the assignment to the mortgagor with as little delay as possible; nevertheless, it is fit to apprise the student that such notice is not essential to the validity of the transfer. *Petit v. Ellas*, 9 Ves. 563. In the old case of *Bradwell v. Catchpole*, taken from Mr. Cox's note, 3 Swans. 79, it is laid down, that if any person will take an assignment of a mortgage in which the mortgagor doth not join, he must at his peril inquire what is due upon it, for if the principal hath been paid by the mortgagor or discharged out of the profits, the assignee, though he comes in without notice, cannot set up the mortgage against the mortgagor; and for that reason, where the mortgagor doth not join in the assignment, it is the constant course to take a covenant from the mortgagee who assigns that the mortgage is in force and unsatisfied, &c.

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fact than the money appearing to be due on the mortgage. The case, as stated, was this. L. made a mortgage to P. for 2000*l.* P. being indebted to St. John, in the sum of 1100*l.* assigned the mortgage to him by an indorsement, stamped and signed, but not sealed, as a further security for the repayment of the principal sum of 1100*l.* Afterwards L. and P. both became bankrupts, and L.'s assignees filed a bill to open the account alleging error, and insisting that nothing was due. It was objected that the plaintiffs must redeem St. John, who had nothing to do with the accounts between L. and P., but was a fair assignee without notice of any transactions or accounts between L. and P. The Chancellor (Lord Thurlow) referred the account to the Master, and gave him special directions to say what was due at the time of the mortgage, and also what was due on the mortgage, at the time of the assignment, and what remained due on it; saving the point, how far St. John should be affected, till after the Master made that special report. It came on afterwards, on the Master's report, before the Lords Commissioners, and the Master having reported that P. was indebted to L. in the sum of 7000*l.*, the order that was made by the court declared, that the assignment dated, &c. made by P. to St. John, was to be deemed null and void against the estate of L. the bankrupt; that the assignment was to be delivered up to the assignees of L. to be cancelled; that St. John also was to deliver up to the plaintiffs all deeds, papers, and writings, that came to their hands, or were within their power relating to the estate; and that St. John should re-convey to the plaintiff, the assignees of L. Therefore the final result of that case was, that nothing was due on the original mortgage, and that the two assignees of that mortgage took no benefit from it. The account was settled on the foot of the original mortgage, and the estate was re-conveyed. So far the determination of this case is a direct authority for M.

[907]

“ The cases that have been decided, and long decided too, bear very much on this case. In Vernon, and the Precedents in Chancery, the case is now perfectly settled, that, as between mortgagee, and any person claiming under him, without

Mortgages and his assigns, cannot, without mortgagor, add to what is due, settle account,

or turn interest
into principal.

the privity of the mortgagor, you cannot (s) settle the accounts. Yet if the mortgagee has been in possession, and the assignee has been in possession, the assignee is bound to settle the account of rents and profits with the mortgagee.

"On considering a little the general principle on which this court acts, with regard to mortgages, I do not feel any difficulty in deciding this point. It is true, a mortgage may be considered as the conveyance of a legal term; but then it must be apparent on the face of the title, that it is not an absolute conveyance of a term, but the conveyance of a term, or of the inheritance of the estate, as a security for a debt; and that the real transaction is an assignment for a debt from A. to B., that debt being collaterally secured by a charge on the real estate. On this principle, therefore, it is obvious, if an action was brought on the bond, in the name of the mortgagee, the mortgagor would pay no more than the sum found due on the bond; or in covenant, brought in the name of the covenantee, the accounts must be settled in that action, according to the amount of the principal money and interest. There seems to be no reason in this court, why the condition of the assignee of a mortgage should be better than it is at law, to recover that, which was transferred to him by the assignment (t)."

[908]

Principal object
in transfer of
mortgage should
be assignment
of debt (r).

The principle first laid down by Lord Loughborough, in the case of *Matthews v. Shephard*, that the real transaction in the transfer of a mortgage, amounts merely to an assignment

(t) *Notes.* The Lord Chancellor, after delivering his judgment in this case, said, "I was referred by a note to a book, which I am not acquainted with, nor am I acquainted with its character, Powell on Mortgages. It is said, that in page 168, 9, and 206, 7, vol. I. he treats this point

as clear." Mr. Solicitor-General said, "Mr. Powell is a gentleman of considerable practice." The author thinks it necessary to insert this note, the observation having been grossly misrepresented, in stating this case, in several daily papers.

(s) "Add to what is due, settle the account, or turn interest into principal"—per Mr. Vesey's report of this case, vol. iv. 128.

Utility of note
of hand accom-

(t) At law, the mortgage debt being a *chose in action*, is not, in general assignable. A power of attorney, therefore, must be given by the mortgagee

of a debt, collaterally secured by a charge on the real estate, being admitted, the conclusion his Lordship drew, on general reasoning, will be found to follow, as a necessary consequence, in a court of equity; for, taking the mortgage as a debt, if it be not on a negotiable contract, it is merely a *chose in action*, for which the assignee has no remedy at law, or right to sue in his own name, and has only *an equitable* remedy, which fails when the debtor has a legal discharge, as a release upon payment of the money, or any part of it.

But if the debt were on a negotiable security, as a bill of exchange collaterally secured by a mortgage, and the mortgagee, after payment of a part of it by the mortgagor, actually negotiated the note for the value, the indorsee or assignee would, it seems, in all events, be entitled to have his money from the mortgagor, on liquidating the account, although he had paid it before; because the indorsee or assignee has a legal right to the note, and a legal remedy at law, which a court of equity ought not to take away from him, but to allow him the benefit of on the account.

Whether rule as to account applies, where there is negotiable collateral security.

And here (x) we must particularly remark, that *generally* an assignment to give title to interest on interest, must be made with the concurrence of the mortgagor; for where it is assigned without his assent, the assignee must take it *only* upon the same terms with the assignor.

Interest cannot be turned into principal, without mortgagor's consent (U).

[909]

(x) *Ashenkurst v. James*, 3 Atk. 271. Rep. 232, et vide an essential qualification, infra, 952. 1007.—Ed.]

to the assignee, to enable him to proceed in his name on the covenant and bond, which power being given to secure money, is not revocable by the mortgagee. *Walsh v. Whitcomb*, 2 Esp. N. P. O. 265. *Bromley v. Holland*, 7 Ves. 23. When it is said that a debt is not assignable at law, it must be understood with this restriction, that if it be secured by a negotiable instrument, such as a bill of exchange, the legal interest will pass by indorsement, and this has induced the learned author, in the next paragraph of the text, to suggest, whether in such a case, the rule as to the mortgagee's liability would apply; for that the assignee or indorsee has a legal right in the debt, and a legal remedy at law, which equity would not take from him. Hence the utility of a note of hand as a collateral security to a mortgage.

paying mortgage.

(U) So in the civil law, *nullo modo usura usurarum à debitoribus exigantur* [this rule was consequently confined to the debtor himself, and did not extend

[909*]
Interest on interest not al-

Thus (y), where the bill was to have the redemption of a mortgage of the manors of B. and S., in the county of C., which mortgage had been assigned to F., one point was, whether, there being great arrears due at the time of the assignment, which were paid by F., the money paid for interest, *then* in arrear, should be reckoned principal as to him, and carry interest with it? And it was insisted for the mortgagor, that interest was never made principal, in such case, unless the mortgagor had joined in the assignment; and the case of *Porter v. Hubbart* (x) was cited, where, in a like case, it was

(y) *Earl of Macclesfield v. Fitton*,
1 Vern. 168, ante, 904.

(x) 2 Ch. Rep. 86. S. C. 3 ib. 78,
[and Nels. 150.—Ed.]

allowed by Roman
law, except,
when.

to the case where a third person paid for a debtor interest to his creditor], *et veteribus quidem legibus constitutum fuerat, sed non perfectissimè cautum. Si enim usuras in sortem redigere fuerat concessum, et totius summae usuras stipulari; quæ differentia erat debitoribus à quibus reverà usurarum usura exigebantur? Hoc certè erat non rebus, sed verbis tantummodo legem ponere. Quapropter hoc apertissima lege definimus, nullomodo licere cuiquam usuras præteriti temporis vel futuri in sortem redigere, et eorum iterum usuras stipulari. Sed etsi hoc fuerit subsecutum, usuras quidem semper usuras manere, et nullum usurarum aliarum incrementum sentire; sorti autem antiquæ tantummodò incrementum usurarum accedere. Cod. de usur. lib. iv. tit. 32. 28.* But according to the same law the rule thus prohibiting the taking of interest on interest did not hinder a minor from exacting lawfully from his tutor or guardian, not only interest for the sums arising from the interest which the minor's debtors had paid to the guardian, but also interest on interest of sums which the said guardian might owe upon his own account to his pupil. See 1 Domat. C. L. 422.

Compound in-
terest not un-
lawful in Eng-
land, but disal-
lowed in regard
to mortgages.

By the law of England, compound interest is not an unlawful thing in itself, and in some particular trades it is allowed, per Lord Com. Wilson, in *Morgan v. Mather*, 2 Ves. jun. 21; but Lord Com. Eyre particularly desired it to be observed, that the court was not to be understood to have laid down any thing upon the subject of interest that had relation to mortgages, ib. et vide infra, latter end of note to p. 991. Lord Thurlow's opinion was in favor of interest on interest; because he did not see any reason, if a man did not pay interest when he ought, why he should not pay interest for that also. But Lord Thurlow said, he found the court in a constant habit of thinking to the contrary; and therefore he was obliged to bend to authority. *Waring v. Cunliffe*, 1 Ves. jun. 99. His Lordship expressed the same opinion in *Champion*, Ex parte, 3 Bro. C. C. 439.

Agreement by
trustee to turn
interest into
principal, bind-
ing on cestui
que trust.

In *Conway v. Shrimpton*, 21 Vin. Abr. 511, (S. C. ante, vol. i. p. 384, in text, on other points) an equity of redemption was conveyed to A. in trust for payment of debts, and the surplus to B.; A. agreed with the mortgagee to turn interest into principal: this agreement of the trustee was held binding on B. though he was no party to it.

decreed that interest should be reckoned principal; but the decree was reversed in the House of Lords; because the executor of the mortgagor was no party. But the Lord Keeper said, *that* precedent could not weigh much with him, he was of counsel therein, and it was hard in all its circumstances. For although he thought it reasonable, that the interest paid upon the assignment should be reckoned principal, yet he would not now make a new precedent. However, his Lordship directed the defendant's counsel to search for precedents, and said, that if they could find any one, he would follow it in this case; but no such precedent could be found.

This rule admits of distinctions in particular circumstances. Thus (a) where creditors procure a decree for sale of an estate before a Master, and one, by consent of all parties entitled to the estate (being confirmed the best bidder by authority of the court, all the incumbrancers agreeing he shall be purchaser) takes an assignment of all incumbrances; in this case he will be a creditor of the mortgagor for the whole sum, as well what he paid for interest due, as for principal, together with interest upon the interest, their consent being the same thing, as if they had been made parties to the assignment.

Nor as against other incumbrancers without their consent (aa); which they will be considered as giving, by confirming sale to best bidder.

It is said, that in Hilary Vacation, a little before Easter Term, in the 26th & 27th Car. 2. (b), the Lord Keeper declared it should be the rule that a mortgagee, on his mortgage being forfeited, should have interest for his interest.

Formerly said that interest should bear interest, if mortgage were forfeited.

Thus (c), where a mortgage was made in June, 1678, for 450*l.* principal money, payable at the end of five years, and interest in the mean time half-yearly; and, about two months before the five years were expired, the mortgagee (no interest having been paid) assigned the mortgage to the defendant in consideration of 560*l.* being so much due for principal and interest; the question was, whether the interest then due should carry interest? It was objected, that the mortgagee ought

(a) *Ashenhurst v. James*, 3 Atk. 271,

(b) 1 Ch. Ca. 258.

ante, 908 a.

(c) *Gladman v. Henckman*, 2 Vern.

(aa) [S. L. *infra*, pages 911, 12, 135. Hil. 1690. and 932.—Ed.]

not to have assigned until the five years were expired (cc); *sed non allocatur*, for the mortgage was forfeited long before, by non-payment of the interest; and the 560*l.* was decreed to be paid, with interest, from the time of the assignment.

This rule soon laid aside, and now interest not allowed on arrears, though as to costs it is otherwise (v).

[911]

But this rule, if ever made, seems to have been laid aside soon afterwards; for, where G. (d) in 1641, made a mortgage in fee of lands, worth about 30*l. per annum*, to C. to secure 300*l.*; in 1652 the mortgagee took possession, and in 1660 devised the lands to A.; in 1680 (which was five years after the rule above-mentioned is said to have been made) the devisee brought a bill to foreclose. The wife of the mortgagor had recovered a third part, as dower, against the mortgagee, so that the profits did not answer the interest of the money, which was then 8 *per cent.* and there had been infancies on the plaintiff's part for several years. The Master of the Rolls decreed the plaintiff to redeem, and pay 8 *per cent. only*, that being then legal interest; and said, that though the profits were not sufficient to answer the interest, yet the arrears could not carry interest, although the costs and charges must (dd).

Interest made principal by Master's report computing interest (w).

A Master's report (e), computing interest, makes that interest principal, and to carry interest; for a report is as the judgment of the court, and appoints a day for the payment, carrying on interest to that day; and the parties disobedience

(cc) [As to this, see ante, vol. i. p. 272.—Ed.]

(d) *Proctor v. Cowper*, Pre. Ch. 116. Trin. 1700, [et vide S. L. ante, vol. i. 291, note (F), and infra, pages 919, 20.—Ed.]

(dd) [S. L. as to costs carrying interest, infra, 920, 1.—Ed.]

(e) *Bacon v. Clerk*, 1 P. Wms. 478. S. C. Pre. Ch. 500. 2 Eq. Ca. Abr. 530. 9. *Cruze v. Hunter*, 2 Ves. jun. 159.

(V) So interest will not be allowed on arrears of maintenance. *Mellish v. Mellish*, 14 Ves. 516. As to costs, see infra, p. 991, et seq. in the text and notes.

Judgment at law turns interest into principal.

(W) S. L. *Greenby v. Howe*, infra, 932, in nota. A judgment at law will have the same effect in converting interest into principal, as a Master's report computing interest in equity. Thus, where upon the affirmance in error, in the Exchequer Chamber, of a judgment in an action on a promissory note, and also on a special agreement made by the defendant to replace stock in the funds, which had been lent him, and in the mean time to pay half-yearly sums equal to the dividends, as they accrued, the verdict comprising interest on the

to the court, in not complying with the time of payment, ought to subject him to interest (x).

But the report (f) must be confirmed; for, where A. the defendant, insisted that 800*l.* was owing to him, and, upon the Master's report, only 180*l.* appeared due; the court ordered interest for that sum, from the time of confirming the report absolute, *and not before*; because, until then, it was not any liquidated sum. [912]
Provided report be confirmed,

Where creditors are decreed to be paid according to their priority, if the estate is deficient, the principal only shall bear interest after the confirmation of the report (g) (y). *and estate be sufficient to pay all incumbrances.*

(f) 1 P. Wms. 453. 480. *Kelly v. Wms.* 376. 453. 480. 2 Eq. Ca. Abr. 530. *Lord Beloe*, 1 Bro. P. C. 202, ib. (g) *Neal v. Attorney-General*, Mos. 566. 2 Ves. jun. 159. Mos. 27. At- 247. *Astley v. Powis*, 1 Ves. 493, [et *terney-General v. Brewer's Co.* 1 P. vide infra, 913.—Ed.]

note, and dividends on the stock, up to the time of the verdict, and it was moved for interest (not for further dividends) on all the capital sums recovered, up to the time of the affirmance, the motion was allowed. *Dwyer v. Gurry*, 7 Taunt. 14. But it should also be remarked, that the Court of Exchequer Chamber does not in the ordinary exercise of its discretion, give interest upon the evidence of affidavits, but only on that which appears on the record to bear interest. *Anon.* ib. 244.

(X) So in *Perkins v. Baynton*, 1 Bro. C. C. 574, it was agreed, by the counsel on both sides, and by Mr. Dickens the Register, that when subsequent interest is directed to be computed, it is the course of the court, in the case of a mortgage, to compute such interest on the principal and interest reported due; but in cases of bonds or legacies, to compute it on the principal only. The ground of this practice of allowing interest on the whole sum computed due, is, that the party comes for the favor of the court: he is ordered to pay a given sum on a certain day, and if he does not he is put under terms of paying what will indemnify the other party completely. But this, as before observed, was not the course of the court in reference to a bond; and, therefore, where the Master of the Rolls had allowed interest on the whole sum found due for principal and interest on a bond, the Lord Chancellor in a recent case corrected the mistake, which he said was not probably brought under the consideration of the Master of the Rolls. *Turner v. Turner*, 1 Jac. & Walk. 47. *Interest allowed on whole sum reported due on mortgages, contra on bonds and legacies.*

(Y) The general rule is, that interest will be allowed on the consolidated sum, though part of it be in respect of costs (*Bickham v. Cross*, 2 Ves. 471) from the time the report is confirmed, and the principal will carry interest from the date of the report up to the time of its confirmation. *Jacob v. Suffolk*, Mosl. 27; et vide the preceding note. [912*]

Interest not allowed to carry interest on a suit for sale against other mortgagees or bond creditors.

And although the report *be* confirmed, yet, if the suit be for a sale, and not to foreclose, interest shall not carry interest, if there be other mortgagees, and bond creditors, parties thereto.

Bill praying sale, and bill of foreclosure distinguished.

Thus (h) where the plaintiff, a mortgagee, brought a bill, in conjunction with several bond creditors, against the heir at law of the mortgagor, for a sale of the mortgaged premises, and had a decree accordingly, with a direction to pay the mortgagee his principal and interest, in the first place the Master made a report of a stated sum due, which was confirmed; the mortgagee then moved, that the Master might compute subsequent interest and costs upon the sum reported due. There was not near enough arising from the sale, to pay the second mortgagee and the bond creditors. The rest of the creditors and the mortgagor opposed this motion, and endeavoured to shew a difference between the present bill and a bill of foreclosure, insisting, that in the latter, the court directs the Master to allow subsequent interest upon the sum reported due, because it is a compensation to the mortgagee for being kept out of his money, by the court's allowing time to the mortgagor to redeem; but that here a sale was directed in the first instance, and the interest of the other creditors was concerned; therefore *it would be hard to give interest upon interest in favor of one creditor to the prejudice of the rest.* And the Lord Chancellor allowed the distinction, saying, that it would be rather too much to give such an advantage to the mortgagee over the rest of the creditors, especially as the mortgage carried *5 per cent.* and proposed to the counsel, that from the time of the Master's report being confirmed, it should carry only *4 per cent.* in which the plaintiff acquiesced.

[913]

Interest on interest allowed, if time for redemption be enlarged by court.

Where the court enlarges the time for a mortgagor (i), or a subsequent mortgagee, that is a favor, for they would otherwise be foreclosed, and it is but just and reasonable they should pay for it, and that the first mortgagee should be no loser thereby; therefore, if on a bill to foreclose, principal,

(h) *Harris v. Harris*, 3 Atk. 722. 246, 247, [et vide *Bickham v. Cross*,
(i) *Neal v. Attorney-General*, Mos. 2 Ves. 471.—Ed.]

interest, and costs, are lumped into one sum by a Master; if the mortgagor, or a puisne mortgagee, pray longer time to redeem, they always pay interest for the whole sum.

It seems, in general, that an account (though before a Master) against an infant, on a bill to foreclose, shall not carry interest on interest. *Contra, on account against infant.*

So, upon a bill (*k*) being brought, that an infant might redeem a mortgage, or be foreclosed; upon the hearing it was decreed to an account, and that the infant should pay what was reported due, unless he shewed cause to the contrary within six months after he became of age. A report was made, and confirmed, of 2600*l.* due; and, upon a subsequent order being made to compute interest from the report, the Lord Keeper doubted whether interest ought to be allowed for the interest.

And I should apprehend that in such case (*l*), generally speaking, interest upon interest ought not to be allowed against an infant; because one ground, upon which the court turns the interest into principal, is by way of inflicting punishment on the mortgagor for non-performance of his contract, which motive ought not to operate against an infant. For the same reason, on which the court indulges him with the privilege of shewing cause, after he comes of age, namely, his presumed incapacity in the management of his affairs, which discharges him from any consequences incurred by, or penalty inflicted on, the ground of negligence, operates equally against loading him with compound interest upon an account, when it may be presumed, that the like imbecility, which induces the court to indulge him with an opportunity of shewing cause against a decree of foreclosure, or other decree changing his estate, likewise occasions the non-payment of the interest (*m*).

(*k*) *Bennet v. Edwards*, 2 Vern. 392.

(*l*) Litt. sec. 402, 3, 4. *Ld. Raym.*
25. *Gilb. Ten.* 32.

(*m*) Et vide the case of *Sir Redmond Everard v. Elis. Aston*, 2 Bro. P. C. 56. 12 Vin. Abr. 113. Ca. 47.

If infant be foreclosed nisi, this, a stronger case for not allowing interest on interest.

And if the decree were, that, on non-payment of what should be reported due, the infant should be foreclosed, unless cause were shewn to the contrary within six months, &c. the case would be still stronger against allowing interest upon interest. First, because, by such decree, the mortgagee has the penalty which he annexed to the non-performance of the contract by the mortgagor, namely, the estate discharged from the condition. Secondly, because one ground upon which the court turns the interest into principal, is as a recompence to the mortgagee for the delay he receives, by reason of the indulgence given by the court to the mortgagor, in allowing time for redemption, which reason does not apply here; as, in the case of an infant, the foreclosure takes place immediately, but subject to be opened within six months after he attains his age, if the infant's defence be mistaken, or there be any irregularity on the part of the mortgagee.

But if infant be plaintiff, foot of account will bear interest.

But here we must remark an exception to this rule, as to infants, where an *account and report* are taken and made, in a cause where an *infant is plaintiff*; for there the sum will bear interest from the foot of the account; nothing being more certain, or established, than that a minor is bound and concluded thereby, unless he shew fraud, or error to his prejudice; for it would not only be inequitable, but unreasonable, to take from such defendant, the *benefit* of making use of those proceedings, which he is *forced into* by the infant, and thereby to subject him to the difficulty and expence of taking a new account.

Thus, where Thomas Odell, an infant (s), to whom the equity of redemption of a mortgage for years descended on the death of his father (who had exhibited his bill, in the Court of Exchequer in Ireland, against the mortgagee and his assignee, to redeem the premises, and for an account of the money due on the mortgage) filed his bill of revivor; the cause was heard, and the court decreed, that it should be referred to the Remembrancer to state and settle an account,

(s) *Baddam v. Odell*, an infant, and *Fitzmaurice*, his guardian, 4 Bro. P. C. 447.

*Baddam
v.
Odell.*

who made his report, that 1883*l.* 18*s.* was due for principal and interest, which, there being no objections made, or exceptions taken thereto, was absolutely confirmed. And the cause coming on for farther hearing, it was decreed, that upon the mortgagor's paying the sum of 1883*l.* 18*s.* so reported due, *with interest for the same*, from the time of the report being confirmed *absolute*, the premises should be re-conveyed, and all bonds and securities delivered up.

Afterwards, Odell neglecting to pay the money reported due or any interest for the same, the mortgagee, who had likewise had a suit depending, filed an amended and supplemental bill, in order to have the benefit of the decree, by a sale or absolute foreclosure; and therein, in regard the account of what was due on the said mortgage had been stated in the former cause, prayed to have the benefit thereof, and that the account should be taken, in his present suit, on the foot of the report or decree made in the former suit.

To this bill Odell put in his answer, and thereby, amongst other things, admitted the former report, decree, and proceedings; but insisted that, apprehending he was much aggrieved by those proceedings, he chose to have his bill, upon which the said decrees were made, dismissed rather than submit thereto. Afterwards, the cause came on to be heard, when the court declared, they were of opinion that the defendant, the minor, was not to be concluded by the account taken in the said former cause, but that the plaintiff was entitled to an account, as between mortgagor and mortgagee; and therefore decreed, that it should be referred to the chief Remembrancer, or his deputy, to audit and state an account, between the plaintiff and defendant, on the foot of the mortgages and securities in the pleadings mentioned, in which account both parties were to have all just allowances.

From this decree the mortgagee appealed, insisting, that the infant ought to be concluded by the account taken in the former cause, on a bill originally brought by his father, revived, and carried on by himself, confirmed by subsequent orders of the court, and signed and inrolled; and that he ought not to

be permitted to wave, or vary the same, especially when neither fraud nor error in the account were even suggested.

And so it was adjudged, as to that point, and the decree reversed; and it was farther ordered, that the account taken upon the former decree should stand, with liberty for the infant to surcharge or falsify the same; and that, in case of any surcharge, or falsification, the Remembrancer should deduct so much as ought to be deducted on account thereof; and that the Remembrancer should carry on the account of the *subsequent interest, from the time of the confirmation of the former report*, for the sum thereby reported due, after such deductions made thereout as aforesaid.

[916]

Mortgagee threatens to enter. Agreement by infant to pay interest on arrears, binding.

So, likewise, a distinction is made (o), where an infant concerned agrees to allow interest or interest, and a benefit accrues to him thereby, and it would be unjust to take it from the mortgagee; for, in such case, it shall be allowed; as the law, at the same time that it protects the imbecility and indiscretion of infants from injury, through their own imprudence, enables them to do binding acts for their benefit, and, without prejudice to themselves, for the benefit of others; for the end of the privilege being their protection to *that object*, all the rules, and their exceptions, must be directed; and *not* to give such acts stability, would be turning their privilege of infancy *against* themselves.

Thus where J. S. mortgaged his estate to C., and then died, leaving D. his daughter and heir, who was an infant, and had nothing to subsist on but the rents of the mortgaged estate (p). The mortgage having been suffered to run in arrear three years and a half, C. grew uneasy at it, and threatened to enter on the estate, unless his interest might be made principal; upon which D.'s mother, with the privity of her nearest relations, stated the account; and D. being then near of age, signed it, and it was admitted to be fair. It was resolved, by the court, that though, regularly, interest should not carry interest against

(o) Co. Litt. 171 b. 172 a. 315 a.

(p) *Earl of Chesterfield v. Lady Cromwell*, 1 Eq. Ca. Abr. 287, pl. 1.

an infant, yet, in some cases, and upon some circumstances, it would be injustice, if interest should not be made principal; and the rather, in this instance, because it was for the infant's benefit, who, without this agreement, would have been destitute of subsistence.

Besides, in this case (*q*), the mortgagee might have obtained immediate payment of principal and interest, by exhibiting his bill to compel a sale for payment of debts.

Mortgagee may pray sale for payment of debts.

But, in general, interest shall not carry interest upon a mortgagor's signing an account (*r*) whereby he admits so much due for interest; because that, of itself, does not shew any agreement or intent to alter the interest, or nature of that part of the debt, or to turn it into principal; nor does it appear to have ever been so determined; for it seems that, to make interest on a mortgage principal, it is requisite there should be a *writing* signed by the parties, *the estate in the land, being to be charged therewith* (*z*).

Interest not converted into principal by mortgagor's signing private account.

Lord Keeper North was of opinion, in the case of *Howard v. Harris*, that if there were a covenant in the mortgage-deed

[917]
Interest on interest always

(*q*) *Infra*, [try p. 1016.—*Ed.*]

(*r*) *Brown v. Berkham*, 1 P. Wms. 652. *Ante*, 901, 2.

(*Z*) This writing in practice assumes the form of a deed of further charge, whereby it is particularly agreed that the interest shall be converted into principal, and the whole sum carry interest. See the form of such a deed in the Third Volume.

Practice.

The latest case on allowing interest on interest is that of *Sackett v. Bassett*, 4 Madd. Rep. 58; where the defendant mortgaged certain premises to one Brooman, to secure 750*l.*, and interest at 5 per cent., payable half-yearly. Subsequently to the mortgage, various dealings and transactions took place between the parties, and on the 13th March, 1804, another mortgage was taken from Bassett by Brooman, for 1,200*l.*, which sum was composed of the principal and interest due on the first mortgage, and interest upon the interest due. The Master by his report, considered this second mortgage as founded in usury and void. To this report exceptions were taken; and the Vice Chancellor thought it a proper question for the consideration of a court of law. He therefore directed the exceptions to stand over until the question of usury had been tried at law, in an action by the mortgagee, on the covenant in the second mortgage deed.

Second mortgage comprises principal and interest on first, and also interest on the interest due on first.—Qu. if second mortgage void as usurious.

allowed, where there is covenant; because mortgagees may recover at law for a breach with damages (A).

for payment of the interest, upon which an action of debt would lie, the court would allow interest on interest, though no account was taken before a master (s). In that case a mortgage for 1000*l.* had been made [of a reversion in fee expectant on a lease for three lives, in which lease a rent of 7*l.* 10*s.* only was reserved,] and in the deed there were covenants for payment of the principal and 60*l.* *per annum* interest [half-yearly. At the time of filing the bill an arrearage of ten years interest had accrued due (ss),] and it was urged, that the mortgagee, against whom the bill was exhibited to redeem, ought, in this case, to have interest upon interest, otherwise he would be a greater loser. To which it was answered, that the bill had been filed six years, and that the mortgagee had, by answer, opposed the redemption, and therefore, from that time, he had no pretence for an allowance of interest for his damages; and that it was never known in the court that interest upon interest was at any time allowed in such case. But the Lord Keeper was clearly of opinion, that as to so much interest as was reserved in the body of the deed, that should be reckoned principal; for it being ascertained by the deed, an action of debt would lie for it, and therefore it was reasonable that there should be damages given for the non-payment of that money. As to what had been urged, that this had never been practised, and there was not any such precedent in the court, and that if this were to be established for a rule, every scrivener would reserve all his interest half-yearly, from time to time, as long as the money should be continued out upon the security, which would be to change the law and practice of the court, and make all mortgagors pay interest upon interest; the Lord Keeper said, that he was clear in the distinction between debt and damages, and

[918]

(s) *Howard v. Harris*, 2 Ch. Ca. 147 to 150. S. C. 1 Vern. 194. 1 Vent. 364. Ante, 684.

(ss) [These corrections are authorized by Vernon's Report and Chancery Cases.—Ed.]

Case in text no authority.

(A) This case is clearly not law; it was over-ruled in effect very shortly after its decision, by the Master of the Rolls, in *Proctor v. Cowper*, infra, 919, 20. and supra, 910, and has ever since been considered as of no authority. The learned author raises a distinction, in the next page, whereon he imagines this determination may be sustained; but the case is irrecoverably lost by the assent of both reason and authority.

he saw no inconvenience that could ensue; it would serve only to quicken men to pay their just debts. And it was decreed accordingly, that after a deduction of the yearly rents of the mortgaged premises out of the 60*l.* a year, payable for the interest, the defendant should be allowed interest (B) for the residue of the said 60*l.* a year, *for which* the mortgagee might have *sued at law* and *recovered damages*.

But here we must attend to the distinction between the last case, where the security for the interest rested in *covenant only* (c), and the ordinary cases, where the rents of the mortgaged premises are sufficient to pay the interest, as, if this determination be according to law, it appears to me it must have turned upon that point; for it is certain, that, in general, an agreement made at the time of the mortgage (and a covenant in truth is no more than an agreement) will not be sufficient to make future interest principal, such terms being considered as carrying somewhat of fraud with them; not such fraud as is properly deceit, but such proceedings as lay a particular burthen and hardship upon a man; and against which, therefore, a court of equity relieves.

Thus, where Y. made a mortgage to O. with a proviso, that if the interest was six months in arrear, then it should be accounted principal and carry interest (t); Lord Chancellor Cowper decreed the clause to be vain and of no use, for that an agreement, *made at the time of the mortgage*, would not be sufficient to make future interest principal, but it was requisite that interest should be first grown due, when an agreement concerning it might then make it principal (d).

Distinction in support of last case.

Agreement at time of mortgage insufficient to convert interest into principal.

(t) *Lord Ossulton v. Lord Yarmouth*, 449, et vide *Broadway v. Morecraft*, Mos. 247, et *Meer's case*, before Lord Harcourt, mentioned in *Boonquet v. Dashwood*, Ca. temp. Talb. 40, and 1 Atk. 304, 305, [and see this law acknowledged, *East India Co. v. Atkins*, 1 Stra. 171.—Ed.]

(B) Whence it may be inferred that the mortgagee was in receipt of the reserved rent, though that fact does not appear on the reports.

(C) *Quære* the accuracy of this statement, as all the three reports agree that there was a mortgage. It is impossible to support the case. It has been long since over-ruled. See ante, p. 917 a, n. (A).

(D) But such an agreement will not be usurious at law, though it be not allowed in equity; as where the condition of a bond was for payment of

Agreement at time of mort-

Interest, if converted into principal, must be on fair agreement.

And so was it likewise held in the case of *Thornhill v. Evans* (u) [that if interest be turned into principal] it must be on a *fair agreement*; and [it was in that case said, that such agreements were seldom entered into, unless] on the advance

(u) 2 Atk. 331.

Agree to convert interest into principal at end of year not usury, though inoperative in equity.

100*l.* with interest at 5*l.* per cent. on payment of 20*l.* yearly, by four quarterly payments of 5*l.* each, until the whole should be paid, and an agreement was indorsed thereon, "that, at the expiration of each year, the year's interest due, should be added to the principal sum; and then the 20*l.* received during the course of the year to be deducted, and the balance to remain as principal; and so continue yearly until both principal and interest should be fully paid." This bond and indorsement were held not to be usurious. *Le Grange v. Hamilton*, 4 T. R. 613; an adjudication which was affirmed in the Exchequer Chamber, 2 Hen. Bl. 144. S. C. 5 T. R. 367. And though Lord Mannors, in *Clancarty v. Latouche*, 1 Ball & Bea. 430, appears to be of a different opinion when he admits, that if an agreement to turn interest into principal constitute part of the original contract, it will, according to *Bosanquet v. Dashwood*, Ca. temp. Talb. 37, be usurious and oppressive, yet it is observable, that no such point occurred in *Bosanquet v. Dashwood*, to which the doctrine under consideration can accord. The agreement in that case was for 10 per cent. by letter and bond, subsequently to the original contract, which was obviously usurious, without reference to the point of compound interest which did not arise throughout the case. But the reason why courts of equity will not allow agreements *a priori* for the annual conversion of interest into principal, are, we have seen, (ante, vol. i. p. 154, note (D)), 1st, because a mortgagee cannot originally stipulate for a collateral advantage; and 2d, because it has a tendency to usury although it be not usury in itself. *Chambers v. Goldwin*, 9 Ves. 271.

Of compound interest between merchants.

After an acquiescence in accounts annually furnished by bankers, an agreement, that the balance of principal and interest shall bear interest, will be presumed. *Clancarty v. Latouche*, ubi supra. But this, though allowed in transactions between bankers and merchants, is never applied to a case of real security. *Bevan, Ex parte*, 9 Ves. 224, where it was held, that notwithstanding compound interest could not be taken under an antecedent contract, yet that accounts, *inter mercatores*, might be settled even half yearly, with agreements that the balances shall carry interest; et vide S. L. ante, 908, note (T).

Tenant for life pays interest on consolidated sum of principal and interest, for twenty-six years. Agreement to turn interest into principal, inferred; which binds remainder-man.

On the principle of acquiescence, it was in one case held, where interest had for a length of time been paid on a consolidated sum of principal and interest, that an agreement of consolidation should be presumed, which, in some measure, contravenes the general rule, that interest cannot be converted into principal without an express agreement. The case was this:—In 1780, a decree was pronounced, declaring the sum reported due by judgment, and another sum for interest thereon, to be a charge on the lands; and a sale in three months was directed, if the sums were not then paid. The tenant for life, against whom this decree was made, regularly paid the interest on the consolidated sum down to 1806, when he died. The remainder-man refused

of fresh money, [and even then that it was reckoned a hardship on the mortgagor and an act of oppression; except when there were great arrears (E).]

to pay interest, on the interest included in the former report, and insisted on credit for the sums that had been paid by the tenant for life, so far as they exceeded the interest of the principal sum, in liquidation of it. The present bill was filed to carry the above decree into execution. An account was directed on the foot of it, and the Master allowed interest on the consolidated sum, to which an exception was taken. Lord Manners said, that in 1780, the principal and interest was ascertained, and a sale decreed to be had in three months; but the owner of the property, being tenant for life, kept down the interest till 1806, when he died. His Lordship would from this infer an agreement between the creditor and the debtor to this effect: "If you will forbear to enforce a sale I will pay you interest;" and the remainder-man must be considered a party to such agreement. The exception was over-ruled, and the Master's report, giving interest on the consolidated sum before decreed, confirmed. *M'Carthy v. Lord Landaff*, 1 Ball & Bea. 376.

(E) The case of *Thornhill v. Evans*, is also reported in 9 Mod. 333, which, with the report in *Atkyns*, sanctions the above corrections within brackets. The same case also furnishes authority for the position, that where interest is commuted into principal it will carry interest according to the rate which the principal previously bore; as if it be at 4 per cent., the interest on the interest which has become principal, will be computed at 4 per cent. likewise. But if money be lent at 4 per cent., and on a future advance the arrears of interest are converted into principal at *lawful* interest, the interest thus become principal will bear interest at 5 per cent. (3 Mod. 333); for where a sum is by a written undertaking agreed to be paid at a day certain, interest at 5 per cent. is allowed at law. *Slack v. Lowell*, 3 Taunt. 159. And the Master of the Rolls, in a recent case said, it would be ridiculous to have a different rule in equity. See *Upton v. Ferrers*, 5 Ves. 803; also *Parker v. Hutchinson*, 3 Ves. 135; and *Forrest v. Elwes*, 4 Ves. 497; et vide post, page 921, note (H). Four per cent. however, is the usual rate of interest in a Court of Equity, more may certainly be given, and sometimes is, under particular circumstances, but if more be sought, the party must shew himself to be within the circumstances and principle of the excepted cases in which that higher rate of interest has been allowed by the Court. 13 Price, 369. If a debt be agreed to be paid at a certain day, the rate of interest will be 5l. per cent. from the demand. *Upton v. Ferrers*, 5 Ves. 803. *Lowndes v. Collins*, 17 Ves. 27.

A note payable at a day uncertain on a shop debt carries no interest, *Parker v. Hutchinson*, 3 Ves. 135, unless there be some particular ground for it; as where the debtor has done something treating the debt as a specialty, such as including it in a schedule annexed to his will or to a trust deed. *Stewart v. Noble*, Vern. & Scriv. 528. *Barwell v. Parker*, 2 Ves. 364. But generally the mere direction by deed to pay debts, does not infer either contract or trust to pay interest upon debts by simple-contract, nor does a debt by simple-contract carry interest because provision for its discharge is made by a deed of trust; such a deed *per se* does not import contract or trust for the payment of in-

[920*]
Of rate of interest, on interest converted into principal.

What debts bear interest.

Interest on arrears not allowed, though profits insufficient to answer same, by reason of dower, but costs must bear interest notwithstanding.

Interest upon interest will never be allowed (x), because interest is in arrear *when* the mortgage is paid off. G. in 1741, made a mortgage in fee for 300*l.* to C., of lands worth about 30*l. per annum* (y). In 1652 the mortgagee took possession, and, in 1660, devised the lands to E. In 1686 the devisee brought a bill to foreclose, to which the defendant pleaded a settlement prior to the mortgage, but that was found fraudulent; and the wife of the mortgagor had recovered a third part of the estate as dower against the mortgagee, whereby

(x) 2 Atk. 331, et vide Pre. Ch. (y) *Proctor v. Cooper*, Pre. Ch. 116-116.
[S. C. ante, 910.—Ed.]

terest, especially where the creditors have not signed the deed, and no agreement is made to charge the land and discharge the person. *Hamilton v. Houghton*, 2 Bligh, 170. Yet if a man devise his estates for payment of debts, and his simple-contract creditors file bills for a mortgage or sale, the simple-contract debts will carry interest from the time of the master's report being confirmed. *Lloyd v. Williams*, 2 Atk. 108. S. C. Barn. Ch. Rep. 224. It is now established as ageneral principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances. It was once the opinion, that any money *lent* carried interest, and in *Calton v. Bragg*, 15 East, 224, it was so contended, on the ground that the lender would otherwise, for the accommodation of the borrower, lose the benefit which he might make of his capital; and that the lender ought, in equity, to be put in the same situation as if he had applied his principal to his own use. But the Court of K. B. has since holden, that interest is not due by law for money lent, without a contract for it expressed or to be implied from the usage of trade or from special circumstances. If, then, interest be not due for money lent, which is to be repaid either upon demand or at a given time, it follows that it is not due for money payable within a certain time after due proof of the happening of a particular event. And, therefore, where an Insurance Company agreed to pay a certain sum to the executors, administrators, and assigns of the assured, within six months after satisfactory proof of his death; it was held that his executors were not entitled to recover interest upon the principal sum insured from the expiration of six months after due proof of the death of the person on whose life the money was insured. 2 Barn. & Cress. 349.

In *De Haviland v. Bowerbank*, 1 Campb. 50, Lord Ellenborough was of opinion, that where money of the plaintiff had come to the hands of the defendant, to establish a right to interest upon it, there should either be a specific agreement to that effect, or something should appear from which a promise to pay interest might be inferred, or proof should be given of the money being used; and in *Gordon v. Swan*, 12 East, 410, the same learned judge said, that the giving of interest should be limited to bills of exchange,

the profits did not answer the interest of the money, which was then 8 *per cent.* *Et per curiam*: the plaintiff must redeem, and shall pay 8 *per cent.* only to the time of the ordinance of parliament that reduced the interest of monies; and though the profits were not sufficient to answer the interest, yet the arrears cannot carry interest, but the costs and charges must (F).

A mortgagee in possession is not obliged to lay out money *any farther* than to keep the estate in necessary repair (x); *Interest allowed on money expended in support of title.*

(x) *Godfrey v. Watson*, 3 Atk. 518. [*S. C.* ante, vol. i. 189, n. (Q).—Ed.]

and such like instruments and agreements re serving interest. In the latter case, although the money was payable at a particular day, non-payment at that day was held not to give any right to interest. Independently of these authorities, Holroyd, J. was of opinion, upon the principles of the common law, that interest was never given upon a sum certain payable at a certain day. The action of debt was the specific remedy appropriated by the common law for the recovery of a sum certain. In that action the defendant was summoned to render the debt, or shew cause why he should not do so. The payment of the debt satisfied the summons, and was an answer to the action. If the case before the court had been an action of debt, the payment of the principal sum would have been a good defence, because the interest was no part of the debt, but was claimed only as damages resulting from the non-payment of the debt. 2 Barn. & Cress. 352. Where, indeed, the interest becomes payable by virtue of a contract express or implied, then it becomes part of the debt itself, and consequently it would then be no answer to an action of debt for the defendant to shew that he had paid the principal sum advanced, and therefore if a plaintiff in pursuing that remedy which by the common law is specifically applicable to his case, could not have recovered interest, he ought not to be permitted to recover interest by way of damages in an action of covenant, *Higgins v. Sargent*, 2 Barn. & Cress. 348; and it is observable, that a devise will carry interest if the charge be of the simple-contract debts of a third person. *Skirt v. Westly*, 16 Ves. 393. It may also be added, that an equity attaching to a bond attaches also to interest paid on it, and where the Court orders a bond to be cancelled, it will also order the interest paid on it to be refunded. *Hitchcock v. Giddings*, 4 Pri. 135.

(F) This latter sentence of the text is current authority, notwithstanding *Interest on interest.* the case of *Howard v. Harris*, ante, p. 917, to the contrary. And we may add, that the court will not decree interest upon interest, by reason of a custom in a foreign country in which the mortgage contract was entered into. *Boddam v. Riley*, 2 Bro. C. C. 3. And it is observable, that in *Murray v. Palmer*, 2 Sch. & Lef. 488, it was held, that where a sale is avoided, the purchase-money for which was secured by an instrument bearing interest, and interest has been paid thereon, such payments are to be considered as principal, and are to be refunded with interest; for the transaction being avoided, the vendor is not entitled to any thing as interest.

but if a mortgagee has expended any sum of money in supporting the right of the mortgagor to the estate, where his title has been impeached, the mortgagee may certainly add this to the principal of his debt, and it will carry interest (g).

Tenant for life compellable by remainder-man to keep down interest (h).

A remainder-man can force the tenant for life to keep the interest down if the land be charged (a), but cannot compel him to redeem directly, though indirectly he may, by purchasing in the mortgage [and preferring his bill for foreclosure]; then

(a) *Hungerford v. Hungerford*, Glib. Eq. Rep. 69.

Money disbursed by mortgagee carries interest as original sum.

(G) After the rate of the original loan; see ante, 920, n. (E). So in the case of *Woolley v. Drage*, (2 Anstr. 551), on a bill to redeem, the matter was referred to the Deputy Remembrancer of the Court of Exchequer, to take the usual accounts. The principal money lent, carried 5 per cent. interest. The mortgagee being in possession, had advanced money for fines on renewals of leases, under which the premises were held. Upon these sums the Deputy Remembrancer allowed only 4 per cent. interest. Exceptions being taken, the court allowed the same, observing, that the interest upon the advances must be regulated by the interest payable upon the money originally lent. But it should be observed, that since in these cases interest is allowed by the course of the court, and not by the agreement of the parties, the rate is always regulated according to the discretion of the court, *Astley v. Powis*, 1 Ves. 496; and the standing rate of interest in Chancery is 4 per cent. *Spurway v. Glynn*, 9 Ves. 483; *Wood v. Penoyre*, 13 Ves. 325. But it is presumed, that the costs of an ejectment for obtaining possession, will not bear interest, nor the costs in obtaining a decree of account, nor does it appear that there is any difference in this respect between a bill for redemption and a bill for foreclosure.

Tenant for life allowed maintenance, if interest exhausts whole rents.

(H) See also similar law in *Saville v. Saville*, 2 Atk. 463; *Tracey v. Hereford*, 2 Bro. C. C. 128; *Lewis v. Nangle*, ante, 875. *Penrhyn v. Hughes*, 5 Ves. 99; *Bertie v. Abingdon*, 3 Meriv. 560; *Burgess v. Mawbey*, 1 Turn. 174. In *Revel v. Watkinson*, 1 Ves. 93, it was held, that a tenant for life must keep down the interest though the whole of the rents and profits may be thereby exhausted; but it was said, that the court will allow a reasonable sum for his maintenance, out of the profits, if he be the heir at law, not otherwise provided for. So in *Burgess v. Mawbey*, the Master of the Rolls said, the principle was perfectly clear, the tenant for life is bound to keep down the interest of incumbrances: beyond that as between him and the remainder-man he is bound to do nothing; and after paying the creditors the interest of their debts, he may put the surplus of the rents and profits into his own pocket. In the case before the court, the tenant for life had the ultimate reversion in fee, and a distinction was attempted on that ground, but, said the court, the answer was, that the ultimate remainder in fee was worth nothing; the estate was given to so many intermediate persons in tail, that the ultimate remainder could add no value to the life estate. A second ground upon which it was

the tenant for life must pay one-third (aa), or part with the possession. Thus, where A. granted a charge of 100*l.* *per*

(aa) [Or other proportion, according to the rule laid down in vol. i. p. 312, n. (M).—*Ed.*]

argued, that the tenant for life was entitled to favor was, that being the eldest son, he was entitled to maintenance as against the remainder-man. It is perfectly clear, said the Court, that the heir at law not otherwise provided for, is, as against the remainder-man, entitled to a provision; but it is not stated in any part of the pleadings, that the tenant for life in the case in question, was unprovided for. In point of fact, the tenant for life received considerable other property from his father besides the estates which formed the subject of the suits, and on the whole it was held, that a decretal order confirming a report that the tenant for life's executor was to be admitted a creditor for the sums paid by his testator and himself, was erroneous. 1 Turn. 174. 8.

P. 921
continued.

If there be tenant for life with remainder to another for life, and, during the first estate for life, the whole profits are not sufficient to answer the interest of the debts, so that there is an arrear, such arrear will become a charge upon the inheritance, provided both estates for life are limited by the same settlement. But if they are not created by the same instrument, and there is first a deficiency, and afterwards more than sufficient, the surplus accruing to the trust estate will be applied to answer the former deficiency; any other construction would create much inconvenience and confusion. So if a tenant for life of an estate, let on leases for lives, should receive the profits of fines for renewal on lives dropping in, he must apply those profits to the discharge of arrears of interest previously incurred; for otherwise a great burthen would ultimately fall on the remainder-man. *Revel v. Watkinson*, 1 Ves. 94. So if a mortgage be made of a variety of estates, part in possession, and part in reversion expectant upon the life estate of A., and afterwards all those mortgaged estates come to B. for life, (living A.), B. must apply all the profits of his life estate in possession in keeping down the interest of the mortgage; and, if those profits are insufficient, his life estate in reversion, upon the death of A., will be chargeable with the arrears of the interest; and the rule will be the same, though by this means, it may turn out, that B. never obtained the least advantage from his life estate; *Tracy v. Lady Hereford*, ubi supra; from which this general rule may be deduced, that the taker of two funds, one productive and the other unproductive, as an estate in possession and an estate in reversion, must keep down the interest of the whole charges upon them, and pay off the accruing interest out of the rents and profits of life estate before he can take any benefit of the devise; and that he will not be allowed to throw the charge on the reversion.

But he must apply accruing profits in discharge of former arrears.

The leading case on this head is that of *Pearlyn v. Hughes*, 5 Ves. 106, wherein the Master of the Rolls said, that nothing was more clear than that if a tenant for life continues in possession, but applies no part of the rents and profits in reduction of the [interest on the] mortgage, though, as between the mortgagee and the estate, the mortgagee would have a right to be paid out of the estate into whose soever hands it might come; yet the reversioner might

Reversioner may file bill against tenant for life, to make him answer arrears.

annum in fee (b), and devised estates to B. for life, remainder to C. in fee, and then died. C. exhibited his bill, to compel

(b) Cited in *Hayes v. Hayes*, 1 Ch. Ca. 223.

Rents of life estate applicable to discharge arrears accumulating during former life.

file a bill to make the rents amenable, and compel the tenant for life to answer for what had accrued. The Master of the Rolls added, that however hard it might be on the tenant for life, yet it was perfectly established that the rents and profits during the estate for life, must be applied in reduction of any interest accrued prior, as well as subsequent, to the commencement of that estate; and, in the case before him (the circumstances of which are briefly stated, ante, vol. i. p. 219, *in notis* (he was bound to declare that all the interest which had accrued due, during the possession of the plaintiff, ought to be applied in keeping down the interest, not only that might have accrued during that possession, but all that had accrued previously. The ground was, that the estate in the hands of the tenant for life was liable to incumbrances; and the estate for life was, in the first place, amenable, and might be made so by an application on the part of the reversioners, to all the interest accrued due upon incumbrances prior to that estate for life. It was very hard; for the tenant for life might lose all his estate. But it was to be remembered, that both the tenant for life and the incumbrancers had a right to have the estate sold; and if so, then the tenant for life would have his estate for life in what remained of the money produced by the sale after the incumbrances were paid; and it would be divided as the law provided (*viz.*) in the proportions their interests bore to the estate. To explain this proportion, the tenant for life or incumbrancer might apply to the court, and then the estate would be sold; and what remained after discharging the incumbrances, would be put out at interest, and the tenant for life would be entitled to the interest of the investment.

When estate in mortgage is sold, tenant for life entitled to interest of money after paying incumbrance.

Observations on latter rule.

On this latter expression of the rule, a case might be put extremely oppressive to the remainder-man. Suppose a tenant for life to have permitted the interest to run in arrear for a considerable time, and then to apply to the court for a sale. If a sale were directed, and out of the produce the incumbrance and all arrears were paid, and the tenant for life allowed to receive the interest of the residue, it would, in fact, amount to a payment of the arrears out of the corpus of the estate, which in right belongs to the remainder-man. His Honor's expressions are certainly open to this interpretation; but such, it is presumed, was not his meaning. In *Thya v. Duvall*, 2 Vern. 117, the bill was to be redeemed or foreclose. It was objected, that the defendant was only tenant for life of the equity of redemption, and the remainder-men over were not made parties. The court directed a bill to be brought by the defendant Duvall, to have a sale made, the mortgage debt paid, and the surplus distributed amongst the tenants for life and remainder-men in proportion according to their respective interests. At the present day, it is apprehended, that a Master would in such case be directed to ascertain what share or interest in the surplus, should, under all the circumstances, be awarded to the tenant for life.

Arrears considered in refer-

With respect to arrears, the mortgagee or incumbrancer can in very few instances (and those are noticed in vol. i. note (D), p. 218, lose all title to

the tenant for life to pay the arrears, as otherwise all would fall on the reversioner, and it was so decreed.

them; for they are charges on the land as well as the principal, and must be borne by the estate, though they accrue during the life-time of the particular tenant and are levied after his death on the remainder-man. As between the particular tenant and remainder-man, the latter is in possession of three remedies to protect himself from an accumulation of interest, *first*, he may, if the tenant for life be living and the mortgagee be not in possession, apply to the court for a receiver, with directions for him to take the rents half-yearly, pay the current interest, apply the surplus in liquidation of the arrears, and remit the residue from time to time to the tenant for life, see ante, vol. i. 300; *second*, he may file a bill to make the rents amenable to the interest, and to compel the tenant for life to answer out of his effects for the arrears. *Penryhn v. Hughes*, ubi supra; and, *third*, he may, in case of the death of the particular tenant, file a bill against his executors, to be reimbursed the arrears which he has paid to the incumbrancer, and which accrued due in the life-time, and are therefore the proper debt of, the particular tenant; *Chaplin v. Chaplin*, 3 P. Wms. 235. 5 Ves. 106; *Finch v. Finch*, 1 Ves. jun. 535; *Burgess v. Maubey*, 1 Turn. 170. Yet some observations which fell from Sir William Grant, M. R. in *Bertie v. Lord Abingdon*, 3 Meriv. 566, may possibly be considered as affording authority for the contrary position, viz. that the assets of a tenant for life are not answerable for the arrears which may have accumulated during his life-time. The observations alluded to are these:—“The remainder-man takes subject to all incumbrances. What the incumbrances are is a mere question of fact. Unpaid interest is as much a part of the incumbrance as the principal money. In point of fact, the interest of the mortgage made by Peregrine Bertie to the trustees under the late Lord Abingdon's settlement is unpaid; *prima facie*, therefore, it must constitute a charge upon the real estate; and the owner of the real estate has no right to call upon the owner of the personal estate [of the preceding tenant] to exonerate him from that charge.” 3 Meriv. 566, 7. These observations, however, were made in a case which was very peculiarly circumstanced (see ante, vol. i. 223, 3, in *notis*), and do not in direct terms affirm that the assets of a deceased tenant for life are not answerable for arrears of interest which have accrued due on a mortgage or other incumbrance during his life-time. Nevertheless, the reader should bear in mind, that there is no express authority either the one way or the other. But Lord Hardwicke's observations in 3 P. Wms. 235, are obviously incompatible with the doctrine, that the death of the tenant for life exonerates his assets from the payment of arrears of interest which he ought to have discharged in his life-time. Whether the assets of the last tenant for life will be answerable for arrears of a preceding tenant, has not in any case been even hinted at; but it is presumed they would, if it could be proved that the rents were sufficient to pay the current interest and also the arrears, and that the former tenant for life was in receipt of those rents, at least so it may be inferred from the case of *Penryhn v. Hughes* so frequently referred to in the earlier part of this note.

once to tenant for life, mortgagee, and remainder-man.

Assets of tenant for life answerable for arrears when.

This

Contra, of tenant in tail; for he has estate of inheritance and power over reversion (K).

If there be tenant in tail (c), remainder over, subject to a preceding mortgage or incumbrance, and tenant in tail be in possession and receipt of the rents and profits, and lets the

(c) *Amesbury v. Brown*, 1 Ves. 477. 2 Bro. C. C. 123.

Dowress redeeming has claim on estate for two-thirds of interest, and whole of principal.

This rule compelling a tenant for life to discharge the interest of mortgages and other real incumbrances, applies as well to a tenant in dower and a tenant by the curtesy, as to any other species of tenant for life, *Gwillim v. Holland*, and *Monksfield v. Bunbury*, 2 Bro. C. C. 128, Belt's ed. n. (1); except that as to the dowress, she being entitled but to one-third of the estate during her life, will not be compelled to keep down more than one-third of the interest of any charges affecting her dower (*Banks v. Sutton*, 2 P. Wms. 716); and as to her share of the principal (supposing that in order to be let into her dower, she is obliged to redeem the whole mortgage) some authorities treat her as being liable to pay one-third of the principal; see ante, 681 and 684, in the text; but according to the modern rule which is mentioned in note (M), ante, vol. i. page 312, it is conceived that if she redeem the whole mortgage, she will ultimately have a claim on the estate for two-thirds of the interest and the whole of the principal. Et vide ante, 681, n. (F).

Tenant for life must keep down interest to day of his death.

It is also understood to be law, that a tenant for life must keep down the interest up to the day of his death, and not only so far as the preceding quarter or half year may extend; for the interest on a mortgage becomes due from day to day, and the mortgagee may call in his money whenever he will. See *Edwards v. Warwick*, post, 943.

Son joining father in mortgage not liable to interest till his father's death.

In a case where a son entitled to a remainder in tail, joined his father tenant for life in suffering a recovery, whereby a former mortgage on the estate was let in, and the father and son both joined in a covenant to pay the mortgage money and interest; and the mortgagee warranted to the son the payment of a certain annuity out of the lands, and then suffered the father to take the profits of the lands, and failed in payment of the annuity, it was held upon an appeal in Ireland, that the mortgagee had no claim on the son for the arrears of interest accumulating during the life-time of the father. *Gay v. Cox*, 1 Ridgw. P. C. 153, et vide *S. C.* ante, 871, n. (B).

[924. *]

Principal of charge directed to be paid out of rents,—that sum paid off, tenant for life liable to pay interest only of new sum borrowed.

In another case Lord Northington put this question to the counsel in the cause: Suppose tenant in fee subject to a mortgage of 3000*l.* devises to A. for life, remainder to B. in fee, and directs the rents and profits to be applied in discharge of the principal of the said sum of 3000*l.*, and they both join in a new mortgage for 3000*l.* paying off the old loan; could B. come into a court of equity to have the old trusts of the rents and profits applied? To which the counsel for the defendant submitted he could; the Lord Keeper thought the contrary; for a new sum was charged on the estate secured by a new term, which must follow the general rule of the court, and while it continued on the estate the particular tenants were only bound to keep down the interest. *Peterborough v. Mordaunt*, 1 Eden, 474.

(K) But a tenant in tail, who is by act of parliament prevented from barring the remainders, as, tenant in tail of the gift of the crown for services per-

interest run in arrear, without applying them to keep it down, neither the issue in tail or the remainder-man can come against the tenant in tail, to compel the keeping down the interest, or against his representatives after his death, to compel the indemnifying and discharging the remainder from the arrears of interest (d) incurred during his possession and receipt of the profits; for, in this case, courts of law as well as of equity consider the reversioner, or remainder-man, as in the power of the tenant in tail.

Thus, where P. C. made a mortgage for years (e), and then entailed the estate mortgaged on himself and the heirs male of his body, remainder to his brother I. C. in tail male, and afterwards died, leaving issue one infant son; the latter suffered the interest to run in arrear for nearly twenty years, and died just before he came of age, leaving a personal estate. Upon a bill filed against his representatives, it was insisted, that his executors, seeing their testator took the rents and profits of the estate, ought to keep down the interest, and the rather, he having never had it in his power to bar the estate by a recovery; *sed per curiam*, there was no precedent of a tenant in tail being obliged to keep down the interest upon a mortgage; for he had an estate which might last for ever, and the remainder over was not assets or regarded in law; and as he had a power over the estate to commit any waste or spoil thereon, a court of equity had never enjoined him to keep down the interest: and the court refused to make any order upon the executors to pay the arrears.

And infant tenant in tail not compellable to pay interest, so as to charge his assets for arrears, though he hath no power to suffer recovery.

[925]

But by a later decision it seems now to be settled, that if tenant in tail be an infant, *not otherwise*, and his guardians or trustees be in possession of the profits of the estate, he shall

Now otherwise, and infant tenant in tail liable to pay interest (L).

(d) 1 Ves. 480.

235. Hilary, 1733. [Coram, Lord Tal-

(e) *Chaplin v. Chaplin*, 3 P. Wms. bot.]

formed, or otherwise, is reduced to the situation of a tenant for life, and must keep down the interest of incumbrances. *Shrewsbury v. Shrewsbury*, 3 Bro. C. C. 126. S. C. 1 Ves. jun. 227.

(L) Lord Hardwicke said, that if in the present case (*Sergison v. Sealey*, 2 Atk. 416) there had been an application to the court during the infant's life

[925 *]
Infant tenant in tail to keep

be liable to pay the interest, because what *ought* to be done by the guardian should be considered as done; and it is a rule, that the act of a guardian or trustee of an infant shall not alter his [the infant's] property, or *that* of those coming after him (f); and the reason why tenant in tail is not liable to pay

(f) *Winchelsea v. Norcliffe*, 2 Ch. Rep. 170. 1 Eq. Ca. Abr. 262, [et vide infra, p. 931. The paragraph there was, it is conceived, intended to be introduced and read before the case of *Amesbury v. Brown*, immediately stated by the learned author at length. —Ed.]

down interest,
when.

by his guardian, the court would have directed the interest of this 2000*l.* to be kept down out of the rents and profits of his estate, and not out of his personal estate. His Lordship added, "Suppose an infant tenant in tail with remainder [to himself] in fee, had nothing to support him but the rents and profits of real estate, and would starve if they were to be applied to keep down interest, I should not, in that case, have directed them to be so applied; but here there is a large personal estate, besides the rents and profits of the real estate, which makes the difference." Hence, if an infant tenant in tail hath no other means of support than the rents and profits of the estate, he will not be obliged to pay interest on incumbrances, if the incumbrancers themselves forbear to sue for their demands, or rather the equity would perhaps be that the infant tenant in tail should keep down the interest with a reasonable allowance for his support. See *Revel v. Watkinson*, 1 Ves. 93. *Burgess v. Mawbey*, 1 Turn. 173. But we have seen (ante, vol. i. 300, in *notis*, sec. vi.) that the obligation to keep down interest can only be enforced by the remainder-man. It follows, that if the infant tenant in tail attains his age of twenty-one years, and suffers a recovery, whereby the remainder is destroyed, the question cannot be agitated, and the real and personal representatives of the *quondam* tenant in tail must take the state of things as they find them, there being no equity for the executor to say, that the real estate ought to bear the arrears of interest which accrued in the life-time of his testator. *Bertie v. Abingdon*, 3 Meriv. 560. *Gressley v. Adderley*, 1 Swanst. 579. S. L. ante, vol. i. 304, in *notis*, sec. ix. 3. In the former case the Master of the Rolls said, there could be no question with respect to the obligation on an infant tenant in tail to keep down the interest of incumbrances out of the rents and profits of the estate; but his Honor added, that it was only by a reversioner or remainder-man that such an obligation, if it all existed, could be enforced. In the case before him, Mr. William Bertie, the tenant in tail, coming of age, suffered a recovery, and re-settled the estate. There was therefore no reversioner or remainder-man to agitate the question as to what ought, or what ought not to have been done with respect to the incumbrances on that estate. *Bertie v. Abingdon*, ubi supra. The same general principle was acknowledged in the still later case of *Burgess v. Mawbey*, 1 Turn. 177.

If an infant tenant in tail is to keep down interest, and his guardian be in receipt of the rents, then if such guardian permit the interest to run in arrear, the guardian or his executor will be personally responsible to the infant for such neglect when he attains his full age. See infra, p. 931.

the interest, which is because he can bar the whole estate, does not operate in this case; for an infant cannot bar the remainders, unless under the king's privy seal (*g*), which is never granted voluntarily to change the rights of the parties, but only in case of family settlements (*L s*).

Thus, where P. was tenant for life of an estate, with power to charge any sum not exceeding 4000*l*. thereon, remainder to W. her son, in tail, remainder to the right heirs of her father, *she* charged the estate accordingly, and then died (*h*). W. died without heirs and under age, leaving the interest in arrear. The plaintiff claimed the remainder as right heir of the father, insisting, that as he was under no necessity of claiming as heir at law of W., the remainder in fee not having vested in possession in his *life*, the personal estate of W. must be applied to pay the interest of the 4000*l*. during his life; but Lord Hardwicke was against the plaintiff on this ground, and decreed for him only on the rule above-mentioned (*m*).

(*g*) *Sir John St. Alban's case*, Salk. 567.

(*h*) *Serguson v. Sealey*, Oct. 25th, 1748. 2 Atk. 416. Cited 1 Ves. 477. 480, and confirmed. [This has always been considered a leading case on this subject, and as forming the rule upon which the court is to proceed; there is, however, a diversity in the reports; that in Atkyns is deficient in dates and circumstances, which have been supplied in a great measure by Mr. San-

ders from the Registrar's books, which on comparison with the manuscript notes of Lord Hardwicke have been found to correspond very nearly as to dates, and exactly as to family. 1 Turn. 176. In *Jones v. Morgan*, 1 Bro. C. C. 206, Lord Hardwicke's doctrine, as here advanced, is recognized by Lord Thurlow; and in *Ware v. Pollitt*, 11 Ves. 257, Lord Eldon states the rule in the same way.—Ed.]

(*L s*) This reasoning was adopted and relied on by the Master of the Rolls, in *Burgess v. Maubey*, 1 Turn. 176. The proceeding by privy seal is of a curious and singular description: Application is made to the king for a recommendation to the judges of the court of Common Pleas, to permit the infant to suffer a recovery; yet it is laid down, that it is at the discretion of the judges whether they will permit it or not, see 1 Ld. Raym. 113. *Newport v. Mildmay*, Cro. Car. 307. The practice of privy seals is now disused, and private acts of parliament are universally substituted in their stead, 5 Cru. Dig. 432; but although privy seals are now disused, yet they are still to be considered as part of the law of the land. *Doe v. Rawlings*, 2 Barn. & Ald. 441.

(*M*) It may be inferred from this statement of the case, that Lord Hardwicke was against the plaintiff, on the ground that the assets of the infant *Doubtful whether assets of*

Tenant in tail paying interest, no creditor on estate.

But if tenant in tail discharge the interest of incumbrances, neither he nor any in his place will be permitted to set up *that* as a fact undone, but the remainder-man shall have the benefit of it (i); and none in the place of tenant in tail can insist on being a creditor upon that estate (N).

[927]
Husband purchasing in mortgage on wife's

If there be baron and feme, and the husband take in a mortgage of an estate of which his wife is tenant in tail, and is in receipt of the rents; the husband will not be allowed in-

(i) *Amesbury v. Brown*, 1 Ves. 477. *Brompton v. Alkis*, 2 Vern. 566.—
S. C. ante, 924; [822, in notis; et vide Ed.]

infant tenant in tail (his guardian being in receipt of rents) must discharge arrears.

were not liable to answer for interest which he ought to have paid during his life. His Lordship's observations were these:—"I do not so much as remember an instance where even a tenant in tail has been obliged to keep down interest; but if he dies during his infancy, and the remainder in fee is limited to a stranger, it may possibly make some difference: but I will not determine now how the court would direct in that case; there must be an account taken of the rents and profits of the real estate of the infant descended upon Mrs. Sergison, the wife of the plaintiff, and so much of them applied as will pay off the interest due upon the 2000*l.* appointed to Mr. Speake, which must be at the rate of 4 per cent., and commence from one year after the execution of the articles of appointment." The account of the rents and profits here directed was, it is presumed, an account of what had accrued due during the infancy, and which had been received by the infant, his trustees, or guardians. If this be so, the case of *Sergison v. Sealey* stands as an authority for the position, that the personal estate of an infant tenant in tail subject to a mortgage will be liable to answer for the arrears of interest accruing due during infancy, if his guardian or trustee has been in receipt of the rents and profits of the estate in the interval, and applied them to the infant's benefit. But it should be distinctly remembered, that in this case the infant died, leaving a large personal estate, as stated in the preceding note, and this circumstance was much relied on in the decision. In *Chaplin v. Chaplin*, 3 P. Wms. 235, the infant tenant in tail having suffered the interest to fall in arrear, died just before he came of age, leaving a personal estate. Lord Talbot was asked to order the executors to pay the arrears out of the personal estate, but he refused to do it. This case, however, is considered to be over-ruled in so far as it militates against the doctrine adverted to in the note (L), page 925, ante.

Text confirmed.

[927 *]

(N) In a recent case Lord Mannors said, that although the case of *Amesbury v. Brown*, 1 Ves. 477, had been ingeniously put, and much relied on, it only amounted to this; that though a tenant in tail is not obliged to keep down the interest on a charge affecting the estate, yet if he do so, his personal representative will not be allowed it against the estate, which did not apply to the case before him. *Redington v. Redington*, 1 Ball & Bea, 143. For similar law, see *Bertis v. Abington*, 3 Meriv. 568.

terest on the mortgage during the life of his wife, on a bill exhibited by them in reversion after her death.

estate, and being in receipt of rents, not allowed interest till death of his wife, though she be tenant in tail (o).

Thus, where A. seised in tail of the equity of redemption of an estate (k), reversion in fee to the right heirs of her brother (which heirs were four sisters, A. being one), levied a fine and made a conveyance thereof to B., by lease and release, in consideration of money paid, and of paying 600*l.* due on the mortgage, and several legacies charged on the estate by the testator's will, under which she claimed. Afterwards *she* intermarried with B., and previous to the marriage a settlement was made of this estate (which was the husband's under the prior purchase) to the husband for life, remainder to the wife for ninety-nine years, if she so long lived, remainder to the issue of the marriage, remainder over. After the marriage the husband took an assignment of the mortgage, reciting that the premises had been devised to his wife, and also took a conveyance of the legal estate in fee to his own use. The

(k) *Amesbury v. Brown*, 1 Ves. 477. S. C. ante, 924.

(O) Nor, indeed, will the husband be allowed interest on such a mortgage during his own life, if he be tenant by the curtesy; for as such he is bound to keep down the interest. *Montford v. Busbury*, ante, p. 923, n. (H); and *Corbett v. Barker*, 3 Anstr. 759. But the husband of a mortgagor in fee is not obliged to keep down the interest during the joint lives of himself and wife; for a tenant in fee may permit the interest to run in arrear to any amount, and such arrears will remain a charge on the estate, and his real and personal representatives cannot, in such case, vary the order and liability of the funds, or change the rights of the parties as fortune has left them; see ante, vol. I. 301, *in notis*, and 3 Meriv. 568. In *Ruscomb v. Here*, 6 Dow P. C. 21, (a case involving the law now under consideration) Lord Eldon said, there were some errors in the decree below:—"The wife died in 1794, and the husband in 1799, and the decree directed that the interest [on the mortgage] should be computed from the death of the husband. While both the wife and husband lived they were not bound to keep down the interest; but when the wife died the husband became tenant for life by the curtesy; and, as tenant for life, was bound to keep down the interest from that time. But the decree directed no account of the interest till the death of the husband. Another consideration was, that as they were not bound to keep down the interest on the mortgage of 1766, how was that to be provided for? The arrear of interest at the death of the wife must be converted into principal, and considered as a charge on the estate, and the estate must answer it. So that the arrear of interest is to be converted into principal at the death of the wife; and to be

Tenant in fee not obliged to keep down interest. So of husband of tenant in fee during coverture; but if he afterwards becomes tenant by curtesy, he must pay interest on arrears accruing during coverture.

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wife died without issue, the husband continued in possession. Then the three co-heirs of the first testator being entitled to the reversion in fee, brought a bill against B. to redeem this estate, on payment of such part of the incumbrances thereon, as they were bound by law to discharge, insisting, that they were not obliged to pay interest on the principal sum of these incumbrances farther back than *from the death of the wife*; for B. having taken in the mortgage, and received the profits, the interest during *her* life would be supposed to be paid; and so it was held by Lord Hardwicke, who said, that there was no determination *directly* on the point, therefore he must decide on general principles.

The wife was entitled herself to the reversion in fee of one-fourth part *(1)*, the other three-fourths thereof belonging to the plaintiffs, the three co-heirs. She might by recovery have barred the reversion in fee in the *whole*; by fine she could bar it in *her own* fourth part. The taking the assignment of the mortgage by the husband appeared from the recital to have been after the marriage, when the husband, if the settlement had been good, was seised in his *own* right for life; if not good, and the estate in tail continued, he was seised in right of *his wife*.

The question was, from what time interest was to be computed? He was of opinion, that the husband was not entitled to have any allowance of three-fourth parts of the interest during the time he was in possession, considering him in any light.

First, as a purchaser of this estate, by the assignment and conveyances made by the wife, when a feme sole, which was

(1) *Amesbury v. Brown*, 1 Ves. 477.

considered as a charge on the estate, and from that time the husband was bound to keep down the interest." Hence, we see, that though the husband of a mortgagor in fee is not compellable to keep down the interest during the coverture, yet if he be tenant by the curtesy, he must, contrary to the general rule, pay interest on the arrears which have accrued due during the joint lives of himself and wife.

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the true way; but if that was out of the case, considering him as husband of tenant in tail, in possession of the estate, having taken in a mortgage thereof, the rule of equity would be, that his purchase would be defeated, but he would have the benefit of the mortgage, so taken in for satisfaction of his principal and interest, so far as they were not satisfied by the rents and profits of the estate; for in that case he must be considered as a mortgagee; if, as a mortgagee in possession, he must account for the rents and profits of the estate, and out of them the interest of the mortgage must be kept down; if he had purchased the reversion only, and taken an assignment of the mortgage, and never come into possession, and his purchase had been *then* defeated, and he evicted, he would have been entitled to have had his whole principal and interest; because he would have received nothing of the estate to keep down the interest.

[929]

So it would be on the foot of the purchase, taking it in the least favorable light for the plaintiffs; nor on the foot of the settlement would it mend the case; for as tenant for life under that settlement he would be bound to keep down the interest, so would the wife have been if she had survived.

This brought his Lordship to the second way of considering it, namely, as if the purchase and settlement were out of the case, and looking upon the husband as having married tenant in tail of an estate, reversion in fee to strangers as to three-fourths, and being in possession in her right, taking in a preceding mortgage, binding that estate in tail, and afterwards continuing in possession, and receiving the rents and profits.

The question *then* would be, whether such an husband, after the death of his wife without issue, was entitled, notwithstanding the receipt of the profits, not to be redeemed without payment of the whole interest? In general, a court of equity endeavoured to make every part of the ownership of an estate bear part of the incumbrance; as if there were tenant for years, or life, subject to a mortgage, he must keep down the

Tenant for years or for life, subject to mortgage, must keep down interest.

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interest during his time (O 2). Suppose the tenant in tail had not married, but had taken an assignment of the mortgage to herself, and died, without barring the remainder in fee; taking the assignment to herself, she would have been considered as owner, and seised of an estate, which might have continued for ever; then perhaps the reversioner would have had stronger reason to say, that the whole estate was discharged of this mortgage (U), than on the other side, the representatives of tenant in tail would have to say, that they should be reimbursed the interest incurred due during her life, because it might be considered as waiting upon the inheritance during that time; but it had not been carried so far as that. In the case of Mr. Smith, of Wheale Hall, Essex, tenant in tail died, without barring, but had taken in a mortgage, which was considered, for the principal, as an incumbrance on the estate, but the question of interest did not arise there. No case had been cited where such a tenant in tail, being in possession, his personal representatives had been allowed to burthen the reversion in fee with the interest incurred during his life, where he was owner both of the estate in possession and the charge; and it would be of very mischievous consequence, if it should be taken to be otherwise. Suppose she, after taking the mortgage, had married, and then died, leaving issue in tail; could her personal representatives come against the issue, to burthen the estate with the interest of that mortgage? It would be considered, as *taken in* for the *benefit* of the issue in tail. Cases of this kind depended on such a variety of circumstances, that it was impossible to draw the line. The tenant in tail was but tenant at will to the mortgagee, who might have brought an ejectment, turned her out of possession, and have received the rents and profits: *then* the profits would have been taken from the tenant in tail

(U) [The rules on this subject have been submitted in a former note, see ante, vol. i. 316, n. (T).—*Ed.*]

(O 2) If both mortgagor and mortgagee claim the rents, the tenant may file a bill of interpleader, provided a suit be depending, to pay the rents into court to await the event, but the tenant cannot by motion obtain leave to dispose of the rents, even if the plaintiff and defendant consent, for he is not a party to the suit. The motion, however, may be made by the plaintiff, and if the defendant consents the order will be made. *Belbec v. Belbec*, 6 Madd. 28.

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during her life. Suppose tenant in tail had afterwards brought a bill to redeem the mortgage, she must have redeemed on payment of principal, interest, and costs; should that burthen the estate of the remainder, with all the interest, which had been paid out of the rents and profits of that estate, in the hands of the mortgagee? None could tell when tenant in tail took the mortgage, or on what grounds it was done. The reason might be, that the mortgagee intended to have brought an ejectment, turned her out of possession, and taken the rents and profits to his own use; that did not appear, but there might be various reasons for taking in the mortgage, as, to prevent suits by foreclosure, or ejectment; and it would be making it liable to too great uncertainty to say, that all the minute considerations of tenant in tail, taking an assignment of a mortgage, should be considered by the court, upon a question between the personal representatives of tenant in tail and the reversioner, after it came into possession. His Lordship did not see how this differed from the case of interest paid by tenant in tail.

He was unwilling to make a precedent of the representatives of tenant in tail, calling back the interest of an incumbrance paid. It was right to let things stand as the courts found them, at the death of the tenant in tail. And though that was not strictly this case, this being a case of a mortgage taken in by husband of tenant in tail, seised in right of his wife, yet that would not make any difference; for the husband of tenant in tail, so seised, ought to be considered *exactly* in the same state as tenant in tail would be, and in no better; namely, taking the estate subject to all the incumbrances, actions, and remedies the mortgagee had therein, and to the right and estate of the reversioner, or remainder-man; consequently, as not having a right, after having received the profits of the estate during the life of the wife, to come against the remainder-man for satisfaction of the interest, which, naturally, the rents and profits were to answer.

[931]

This was not setting up a right to call upon the personal estate of tenant in tail to satisfy arrears of interest, but setting up a right, in the representatives of tenant in tail, to bring a

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burthen on the reversioner in fee, which had been discharged by tenant in tail himself: and as there was no precedent, he would not make one.

*Infant mort-
gagor in fee
dies under age.
Guardian or his
executor per-
mitting interest
to run in arrear,
personally re-
sponsible.*

The guardian of an infant shall not by his neglect, in favor of the personal fund, subject the real estate to the discharge of interest on a mortgage, to which, if due diligence had been used, it had not been liable (*ss*). One having two sons, R. and T. (*t*), and being seised in fee of the manor of B. (which manor was in mortgage) left two sons, one of which died at two years old, and the other at six years old; whereupon the estate descended to the uncle. The guardian of the son had neglected to discharge the interest of the mortgage, and the question was, whether he or the uncle should pay it? It was contended, that the guardian of the son, who was in possession, ought, out of the profits, to have kept down the interest of the mortgage, like the case, where a man mortgages land, and devises to A. for life, remainder to B. in fee; A. must keep down the interest. *Sed per curiam*, that is not like the present case; for in the case cited, a third person, the remainder-man, and one not claiming under the tenant for life, would suffer by non-payment of interest; otherwise here, where the son was entitled to the whole fee-simple, and might, when of age, charge or alien the whole. And if a devisee in fee of a mortgaged estate be of age, and suffers the interest to go greatly in arrear, his executor shall not be bound out of the rents (*tt*) to keep down the same; but this being in the case of an infant and a guardian, it would be a great inconvenience, if the guardian might ruin the inheritance (which it is his duty to preserve) by letting the interest run on, and this to increase the personal estate, of which, possibly, he may be in expectation. And the guardian or his executor, in case of his death, was decreed to answer the interest out of the profits.

*Executor of
adult devisee in
fee, not liable
for arrears of
interest.*

(*ss*) [And that a guardian may pay interest of incumbrances, see ante, vol. i. 284, in the text.—*Ed.*]

(*t*) *Jennings v. Looks*, 2 P. Wms. 276.

(*tt*) [That is, it is presumed, out of the rents received by such devisee, the benefit of which ultimately devolves on the executor, by an increase of the personal estate.—*Ed.*]

If a first mortgagee *cutor* (u), and afterwards suffer the mortgagor to take the profits, without requiring interest, the lands, in the hands of the second mortgagee, shall not be charged with any interest for that time; that is, the interest of the first mortgagee shall not affect the lands, so as to keep out the second mortgagee longer than he would have been kept out, if the interest had been duly paid.

First mortgagee in possession, charged with what he might have received (uu).

A prior incumbrancer (x) having notice of subsequent incumbrancers, shall not turn the interest into principal against them (P).

No conversion of interest with notice.

(u) *Bentham v. Haincourt*, Pre. Ch. infra, pages 949. 951.—Ed.]

30.

(x) *Digby v. Craggs*, Amb. Rep.

(uu) [This subject is fully treated

612, [S. C. 2 Eden, 200, and S. L. ante, vol. i. 291, note (D), et vide ante, 910.—Ed.]

(P) That is, without the consent of the second incumbrancer. The general rule is mentioned, ante, p. 908. The doctrine in the text had been established long before Lord Northington's time, in the case of *Montague v. Ratcliffe*, 5th June, 1706, where it was held, that the assignee of the first mortgage, having notice of the second mortgage, should not turn interest into principal. 2 Fonbl. 438, n. (c), 5th edition. The case of *Digby v. Craggs*, is thus reported in 2 Eden, 200:—J. N. Craggs, by indentures of lease and release, mortgaged his estate at C. to the plaintiff, Mrs. Digby, for securing the sum of 14,000*l.* with interest, at 4 per cent. Being indebted for interest upon the said mortgage, by indorsement on the mortgage deed, he charged the premises with a further sum of 1247*l.*; he afterwards charged the premises with several annuities and incumbrances, of which Mrs. Digby had notice; and becoming still further indebted to her for interest on the said mortgage, by another indorsement in 1757, he charged the premises with the further sum of 1342*l.* The bill was for interest upon the whole sum of 16,589*l.* from March, 1757, or for a foreclosure. Lord Northington was of opinion, that the interest could not be turned into principal by the indorsement of March, 1757, as against the subsequent annuitants and incumbrancers, Mrs. Digby having had notice of such incumbrances. The case of *Greenley v. Howe*, at the Rolls, 18th February, 1763, could not alter this opinion. The ground, his Honour proceeded on, in that case was, that if a mortgagee had filed a bill, his interest, after a report confirmed, would have become principal, [S. L. ante, p. 911, of text,] and therefore, it was reasonable that that might be done amicably, which might be got at by adverse proceedings, and especially as the costs of such adverse proceedings must have come out of the estate, and consequently would have lessened the security of the other incumbrancers. If a bill had been filed by the first mortgagee, it seemed the second might have redeemed him.

Prior incumbrancer not allowed to turn interest into principal as against subsequent incumbrancer with notice.

That may be done amicably which may be obtained adversely.

But though a first incumbrancer cannot, with notice of a subsequent incumbrancer, turn interest into principal as against him, yet it seems he may

Be turned into

Payment to scrivener having bond, good (q).

[933]

If a scrivener is entrusted with the custody of a mortgage-bond (y), he may receive the interest; and though he fail, yet the mortgagee shall bear the loss: and so it will also be, in such case, if he receives the principal, and deliver up the bond; for being entrusted with the security itself, it shall be presumed, that he was entrusted with a power over it, and with a power to receive the principal and interest: the rather, because the giving up of the bond upon the payment of the money, is a discharge thereof; otherwise it is, if the obligee take away the bond; for, in that case, he hath no authority to receive the money.

He can receive interest only, if he have deed and not bond.

If a scrivener is entrusted with the mortgage-deed (x), and not the bond, he hath only an authority to receive the interest, but not the principal; because the giving up the deed is not sufficient to restore the estate, but there must be a re-conveyance; whereas the giving up a bond, is in law an extinguishment of the debt (xz).

But by consent he may receive both, without deed or bond.

Although a scrivener hath neither the custody of the mortgage, or the bond (a), yet if the mortgagee agree that the

(y) *Whitlock v. Waltham*, Salk. 158. S. C. 1 Eq. Ca. Abr. 145, pl. 4. S. C. 1 Vern. 150, et vide *Martin v. Kingly*, Pre. Ch. 209.

(zz) [As to the cancellation of the mortgage deed, see Co. Litt. 232 a. et ante, vol. i. p. 202.—Ed.]

(x) *Whitlock v. Waltham*, Salk. 158. S. C. 1 Eq. Ca. Abr. 145, pl. 4. S. C. 1 Vern. 150, et vide *Martin v. Kingly*, Pre. Ch. 209.

(a) *Whitlock v. Waltham*, Salk. 158. S. C. 1 Eq. Ca. Abr. 145, pl. 4. S. C. 1 Vern. 150, et vide *Martin v. Kingly*, Pre. Ch. 209.

principal, notwithstanding such notice.

make his costs, charges, and renewal fees, principal, notwithstanding such notice. *Godfray v. Watson*, 3 Atk. 518. *Manlove v. Ball*, 2 Vern. 84. *Lacum v. Martins*, 1 Serjt. Wils. 34, supra, 920, 1.

Scrivener with- in bankrupt laws, but attorney not.

[933 *]

(Q) In *Malkin, Ex parte*, 2 Ves. & Be. 35, it was doubted whether the same person could act as attorney and scrivener in the same transaction; and it was afterwards held, (ib. 175,) that a practising attorney, negotiating loans in the course of his business is not a money scrivener within the meaning of the bankrupt laws. S. C. fully reported, 2 Rose, 27. Yet the contrary was holden in *Hutchinson v. Gascoigne*, 1 Holt, 507, which seems to have been again contradicted by *Hurd v. Bridges*, 1 ib. 654. See also *Lewis, Ex parte*, 2 Rose, 59. The question, however, in these cases appears to be, whether the person is by profession a scrivener as distinguished from the profession of an attorney, which he may be also, or whether he is an attorney, merely performing in his ordinary business some of the proper acts of a scrivener.

mortgagor shall pay the interest to the scrivener, the interest may be well paid to him as long as the mortgagee lives.

If a mortgagee, in such case, die (b), and his executor come to the scrivener, and receive interest of him, and at his hands, that becomes due after the death of the mortgagee, this is a good payment; and if, after such receipt, the scrivener break, the mortgagor shall not bear the loss; for it is the mortgagee that trusts the scrivener, and the executor comes into the agreement, and thereby renews it, supposing it was determined by the death of the mortgagee; but it is rather an agreement than an authority, and does not die with the party.

And mortgagee's executor, by receipt of interest from scrivener, confirms agreement.

A mortgagee (c) refusing to receive his money on tender, after forfeiture, will lose his interest from the time of the tender.

Tender suspends interest, if six months

But then notice of paying off the mortgage must have been given to the mortgagee (d) at least *six calendar (dd) months* before, and the money must have been tendered on the day of the determination of that notice; for where the mortgagor omitted to tender the money on the *very* day on which the notice expired, and, in consequence thereof, the mortgagee refused the tender, the payment of the interest was held by Lord Hardwicke not to be *thereby* suspended; for that by the omission of the mortgagor, the mortgagee was become entitled to a farther notice of *six calendar months*, at the expiration of which a strict tender must be made (R).

[934]
notice of payment of principal has been given to mortgagee.

(b) *Whitlock v. Waltham*, Salk. 158. S. C. 1 Eq. Ca. Abr. 145, pl. 4. S. C. 1 Vern. 150, et vide *Martin v. Kingly*, Pre. Ch. 209.

Church v. Bishop, 2 Ves. 372. *Garsforth v. Bradley*, ib. 678. S. L. per Lord Rosslyn in *Lloyd v. Collett*, 4 Ves. 690.—*Ed.*]

(c) *Sir John Austen v. Executors of Sir W. Dodwell*, 1 Eq. Ca. Abr. 318, pl. 9.

(dd) [The computation will be as above expressed, according to calendar, not lunar months. *Dyer v. Smeeting*, Willes Rep. 588.—*Ed.*]

(d) *Hix v. Ling*, before Lord Hardwicke, [S. C. 5 Supp. Vin. Abr. 261.

(R) This notice should specify both the time and place of payment. A form will be added in the Third Volume.

As to the mortgagee, it is clear he may call in his money at his pleasure, and may require it to be paid at as short a warning as he chooses to name; *Mortgagee may require money*

to be paid immediately.

Six months' notice superseded by tender of six months' interest.

Tender must always be to person of mortgagee after condition forfeited.

Usury in taking six months' interest in advance.

for it has never been held, that on a trial of ejectment, or on a bill to foreclose, the plaintiff should be nonsuited, or the bill dismissed, because the mortgagee did not give six months notice to pay the money in, or any other definite notice. The reason is, because at law the estate is his own; and no notice is requisite to entitle a man to recover his own who stands in the situation of mortgagee; so that whenever the mortgagee calls for his money the mortgagor must pay it; and the mortgagee may at his pleasure proceed at law to recover the possession, or in equity to foreclose. But the mortgagor is not in the same situation, he cannot compel the mortgagee to take his money at a moment's warning; he must give the mortgagee six months' notice to recover it; [or, which is the same thing, pay him six months' interest in advance; *Quare, et vide* the next paragraph;] because the day of redemption at law being passed, he has lost his estate at law, and can be let in to redeem by a court of equity only; and a court of equity will not assist, unless he will do equity: and the court holds it equitable that the mortgagor shall give six months' notice of paying in the money, to enable the mortgagee to provide another security for it. But when the mortgagee requires payment, all notice is out of the case: it is not notice, but a demand, which the mortgagee has a right to make, without any limitation of time whatever; and, consequently, when the mortgagee has demanded his money, the mortgagor may bring it him the next day, and if he refuse to receive it he can no longer demand interest; for his demand of the money has made notice from the mortgagor wholly unnecessary. When the mortgagee has demanded payment of his money it must be brought to him personally, for though a place of re-payment is mentioned in the mortgage deed, yet the day of re-payment being passed, the mortgagee is not bound to attend there; and, therefore, it must be brought to him personally. It is thus upon a general demand, but he may give a special notice. The mortgagee, when he makes the demand, has a right to appoint a time and place for payment of the money, and then the mortgagor must attend at the time and place prefixed by the mortgagee to tender the money; otherwise interest will run on to the time of actual payment. 3 Cas. & Opin. 51.

The interests of mortgagor and mortgagee are perfectly distinct, and that distinction is very familiar to courts of equity. The mortgagee is not, in any respect, under the control of the mortgagor; nor could he be compelled to receive his money, even at the expiration of six months notice; for then he might have driven the mortgagor into equity to redeem the estate. Per Richards, B. in *King v. Abbott*, 3 Price, 196. But if a bill were brought, a much greater delay and more difficulties would of course occur. *Casburne v. Scarfe*, 3 Jac. & Walk. 199.

In a late case it was proposed to pay off a mortgage bearing interest at 5 per cent. immediately. The mortgagee refused to take the principal money until after six months notice, on the ground, that if he then laid out his money in the funds he could get no more than 3 per cent. The mortgagor being very desirous of obtaining a reconveyance of the legal estate for the purpose of effecting a family arrangement, then proposed at the end of six months to make up the deficiency of interest which the mortgagee might sustain by investing his money in the funds, to which the mortgagee assented, provided it could be done safely. On laying the case before counsel, he inclined to think that the acceptance of such deficiency would be usury, because the

And such a legal tender as will suspend the interest (e), when made to the mortgagee, will also bind his executors, or devisees.

Legal tender binds mortgagee's executor or devisees

(e) *Sir John Austen v. Executors of Sir W. Dodwell*, 1 Eq. Ca. Abr. 318, pl. 9.

mortgagor not having had the use of the money in the mean time he would be paying more than 5*l.* per cent. interest. It may indeed be said that the surplus payment is not interest, and certainly it cannot be, as the money is not out in use; but if a mortgagee by any means takes more than principal, interest, and costs, it is usury, and this is a means by which more than principal and interest would be obtained; and it is conceived that the usury cannot be evaded by saying that the extra payment is for the purchase of a convenience.

If the mortgagor comes with the money to the mortgagee, or to the time and place appointed, he has a right to require a production and delivery of the mortgage deed, [contra *Langford v. County of Salep*, Toth. 229, infra, 995, 4. 11th section of note there,] and to have it delivered up to him, as the production and delivery of the mortgage deed is the proper evidence to the mortgagor that the mortgagee has not assigned the mortgage to any other person, but has the right to receive the money. Suppose the mortgagee has received the money from a third person, and has assigned over and delivered the mortgage deed to the assignee, and then calls on the mortgagor, (who is ignorant of the assignment,) for the money, and he pays it without requiring to have the mortgage deed delivered up, most certainly the assignee can have no benefit of the mortgage, nor compel him to pay it over again, though the original mortgagee who received the money is become insolvent. But this is confined to the delivery of the mortgage deed; for the mortgagor has not a right to annex a condition to the payment, that the mortgagee shall execute an assignment; because it frequently happens, that a proper assignment or conveyance cannot be prepared without an inspection of the title-deeds in the mortgagee's hands, and it is understood, that a mortgagee is not compellable to produce the title-deeds before he has actually received his money; for otherwise, under pretence of repayment, the mortgagor may look into the title-deeds with a view to discover faults and defeat the security; but the mortgage deed itself, which puts him in the character of mortgagee, and without which he cannot resist the production of the title, must be always open to the inspection of the mortgagor, that he may know his right to redeem. It follows, therefore, that when the mortgagor comes to pay his money, either to the mortgagee himself or to his agent at a time and place appointed, he has a right to expect to find the mortgage deed there; and that it shall be ready to be delivered to him when the money is paid; and when that has been done, he has a right to call for the title-deeds, to enable him to prepare a proper assignment, and to call on the mortgagee to execute it afterwards. The mortgagor is in no danger in paying the money upon receiving the mortgage deed without an assignment; because the mortgage and the receipt together will always shew what the debt is, and that the debt is satisfied; and from

Mortgages requiring payment of money, must be ready with deeds at time and place appointed.

[935*]

Mortgage deed always open to mortgagor's inspection; contra of title-deeds, ante, vol. i. 213.

Mortgagor's oath that his money was always ready.

But, in such case, it seems the plaintiff (*f*) ought to make oath, that the money was always ready, and no profit was made of it; which may be controverted by the mortgagee, who may prove the contrary; namely, that [he demanded it and] the mortgagor was not ready to pay it, in which case the interest must run on.

To stop interest strict tender required.

And, in general, a strict tender must be made (*g*), or the court cannot stop the interest; although cases may be where they would wish to do it; *that* of acting a more generous kind part, if the mortgagee had taken it, is not the rule that the court is to go by.

Tender of money, deducting balance, not enough to stop interest.

[936]

And where there was an open account between the mortgagor and the mortgagee (*h*), and several tenders were made of the mortgage-money, deducting the balance; it was held that the interest should not stop upon proposals to deduct upon an open account of the other side.

Bank note, not a legal tender; but if not objected to at time, good (s).

It was held, where a mortgagor tendered a Bank of England note to the mortgagee, for him to take thereout what was then due for principal and interest (*i*), and the mortgagor

(*f*) *Lutton v. Rodd*, 2 Ch. Ca. 306. *ibid.* 401, note.—*Ed.*]

Gyles v. Hall, 2 P. Wms. 378, *infra*, 940.

(*g*) 2 Ves. 372.

(*h*) *Garforth v. Bradley*, 3 Ves. 678.

[*S. C.* ante, 741, note (C), *et vide*

(*i*) *Sir John Austen v. Executors of Sir W. Dodwell*, 1 Eq. Ca. Abr. 318, pl. 9. Hil. 1729. 3 Bac. Abr. 659, ante, 933, 4.

thenceforth the mortgagee will become a trustee for the mortgagor of the legal estate. 2 Cas. & Opin. 52.

What if mortgagees has settled money on family trusts.

In this place, it may be subjoined, that if a mortgagee has assigned the mortgage to trustees on trusts for the benefit of his family, the mortgagor on paying off the money will not be entitled to the custody of the trust deed, nor to an attested copy thereof at the trustees' expence. So, at least, the law is understood to be; and the trustees should be reminded most cautiously to refrain from entering into a *personal* covenant for the production of the trust deed.

[936 *]

Gold only legal tender. Bank notes only so in case no objection made at time.

(8) By the statute 56 Geo. 3. c. 68. s. 11, gold coin is declared to be the only legal tender, without any limitation of amount; and no tender of silver coin is legal beyond forty shillings. The consequence is, that if the condition in the mortgage deed be (as it usually is) to pay *lawful money* of Great Britain, the mortgagor may be required to procure the whole sum in gold, howe

offered, if he objected to the legality of the tender being in a bank-bill, to turn it presently into money; that although this was not, strictly speaking, a legal tender, yet it being proved

ever expensive and inconvenient it may be to him. *Grigby v. Oakes*, 2 Bos. & Pul. 526. In this case, Heath, J. said, that the legislature acted wisely in not making bank notes a legal tender, and the recent example of France confirmed this opinion; for there, the legislative provision in favor of paper currency, only tended to depreciate the paper it was designed to protect, and were ultimately repealed as injurious in their nature. By the succeeding paragraph in the text, we shall see, that where a tender is made in notes, and the tender is not objected to *on the ground of its being made in notes*, such tender will be considered good. And Lord Rodesdale in a recent case, was disposed to think, that a court of equity would consider a tender in bank notes, during the suspension of cash payments, a sufficient tender; for accidents which prevented a compliance with legal forms were clear ground of equitable relief; and when the law had put it out of the power of any person to obtain a large sum of money in specie, it was impossible for a court of equity not to take notice of that circumstance. *Biddulph v. St. John*, 2 Sch. & Lef. 535.

Whether equity would relieve when cash payments suspended.

By the act of 52 Geo. 3. c. 50 (continued by the 54 Geo. 3. c. 52, during the suspension of cash payments), it is enacted, that in all cases in which any sum of money is directed or adjudged to be paid under any rule, judgment, or decree of any court of law or equity, or is allowed to be paid into court, in order to stay proceedings, or under any distress for rent, &c. in such cases the payment in notes of the Bank of England, if the payment is made in Great Britain, and in notes of the Bank of Ireland, if the payment is made in Ireland, shall be deemed good payments in law; and in all cases in which any money is payable out of any such court, payment in Bank of England notes in Great Britain, and in Bank of Ireland notes in Ireland, shall be good payments in law. So that the above acts go nearly the length of making notes of the Bank of England (in England) and of the Bank of Ireland (in Ireland) legal tenders during the continuance of the suspension of cash payments. By the act of the 59 Geo. 3. c. 49, (which continues the act for suspension of cash payments till the 1st day of May, 1825), the holders of the Bank of England notes to the value of 60 ounces of gold (calculating the value of such gold between different periods after certain different rates) may require payment in gold, but the Bank is not to be compelled to pay gold except in ingots or bars of 60 ounces; so that although gold may be obtained for notes of the value of 60 ounces of gold, yet it cannot be obtained for any further sum of less than the same amount. By the late act (1st & 2d Geo. 4. c. 26, for the gradual resumption of cash payments) the Bank is empowered to pay any debt or demand whatsoever, to which the Governor and Company shall be liable, either in one-pound notes or in the legal coin of the realm, at the option of the said Governor and Company; sections 1 & 5. Sec. 3, provides, that if the Bank shall offer to pay in coin, it shall not be competent for the bearer of any notes to demand payment in ingots, or bars of gold; but if the Bank shall not offer to pay in coin, the bearer of notes shall not be deprived of his

Statutes on tender.

that the mortgagor offered to turn it into money, that made it good.

This view of tendering notes confirmed.

It is necessary to observe, on this subject of tendering bank notes, that it has never yet been determined that a tender of

right to payment in ingots, as directed by the lastly-mentioned act. See also section 3.

General rules on tender.

Lord Coke has observed, that "the feoffee may tender the money [in performance of a condition] in purses or bags, without shewing or telling the same; for he doth that which he ought, viz. to bring the money in purses or bags, which is the usual manner to carry money in, and then it is the part of the party that is to receive it, to put it out and tell it." Co. Litt. 208 a. 8. L. Shep. Touch. 136. Sed vide *Sucklinge v. Coney*, Noy's Rep. 74, where the person held the money on his arm in a bag at the time of offering it, this was adjudged no good tender, for it might have been counters or base money. It behoves the mortgagee to inspect the goodness of the money; for if there be any bad money in the bags, and the mortgagee accepts it, the mortgagor will not be bound to change it. 5 Co. 115. Vin. Ab. Tender (E). But it may be questioned whether he would not, in case there were any base money in the bags, have relief in equity, or at law in an action of deceit. Where the proviso was, that the money should be paid in silver, and the tender, and even payment was in silver and brass, the proviso was held not discharged. *Bath v. Oby*, 2 Bro. P. C. 151. To make a legal tender there must either be an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor. Therefore where the defendant, on departing from home, left 10l. with his clerk for the plaintiff, of which the clerk informed the plaintiff when he called, and demanded a larger sum; and the plaintiff said he would not receive the 10l. nor any thing less than his whole demand, but the clerk did not offer the 10l.; this was held to be no tender. *Thomas v. Evans*, 10 East, 101, et vide *Read v. Goldring*, 2 Maule & Selw. 86. So if a debtor tenders a larger sum than is due, and asks for change, this will be a good tender if the creditor does not object to it on that account but only demands a larger sum. *Black v. Smith*, Peake N. P. C. 88, et vide *Wade's case*, 5 Co. 115 a. If however he objects to the tender as informal, the precise sum must be offered; and if in making a tender the person asks for change out of a pound note, and no objection is made on that account, but it is refused because it is not enough, then the tender is good. *Cadman v. Lubback*, MS. K. B. 1824. Nov. 9. *Batterbie v. Davis*, 3 Campb. 70. *Blow v. Russell*, 1 Carr. & Pay. 365. *Saunders v. Graham*, 1 Gow, 121. An offer to pay a sum of money, with a condition that it shall be accepted as the whole balance due, when a larger sum is claimed, does not amount to a legal tender of the sum offered to be paid. *Evans v. Judkins*, 4 Campb. 156. But a tender of money to an agent authorized to receive payment, is a good tender to the creditor himself. *Goodland v. Blewitt*, 1 Campb. 427. Et vide *Moffatt v. Parsons*, 5 Taunt. 307. 1 Marsh. 55. In the late case of *Meade v. Bandon*, 2 Dow, 261, the mortgagor made a tender

Tendering larger sum requiring change, bad.

bank notes is *at all events* a good tender; and perhaps there may be a great policy in evading such a decision, as the greatest credit such paper can acquire, is the voluntary and universal receipt of it as cash in all parts of the world. But although courts of justice have not yet decided bank notes to be a legal tender, the Court of King's Bench, in conformity with the opinion of mankind, have held, that if such notes are presented in payment, and no objection made to the receipt on that account, they are a *good tender*.

This question occurred in the case of *Wright v. Reed* (j), which arose on an objection taken to the memorial of an annuity, under the 17th Geo. 3. c. 26, upon the ground, that part of the consideration was in money, and the rest in *bank notes* of the Bank of England, whereas the whole consideration was *described as money* in the memorial. But the court were unanimously of opinion, that bank notes were to all in-

Bank notes are cash, if accepted without objection as such.

(j) *Wright v. Reed*, 3 T. R. 554, et 1 Selw. N. P. 348, 5th edit. and Bul. vide *Miller v. Race*, 1 Barr. 452, [S. C. N. P. 34 a.—Ed.]

of payment to the agent of the mortgagee, who refused to accept it. Twenty-four years elapsed without demand of principal or interest. Payment of principal and interest for the whole time, was decreed under the circumstances in the court below, and such decree was affirmed by the House of Lords. *S. C.* ante, vol. i. 396, *in notis*. And it is observable, that a tender of what the mortgagor supposes to be due, does not oust the whole jurisdiction of equity, so as to leave the party to his legal remedy. *Roberts v. Clayton*, 3 Austr. 716. For more on tender, see Tidd's Pract. 209, 7th edit.; and Sellon's Prac. tit. Tender; and as to the old law of tender in performance of a condition, 5 Bac. Abr. 21. Co. Litt. 209 b. Hawk. Abr. by Rudall, 307, and Shep. Touch. 140. In Ireland there was not, till very lately, any lawful money, it was merely conventional; the gold and silver coin was not of legal currency, but only copper. *Lansdowne v. Lansdowne*, 2 Bligh, 79. Now, however, the currency is assimilated throughout the United Kingdom by the late act 6 Geo. 4. c. 79. 27th June, 1825.

On this latter subject, it is merely necessary to add, that if a lawful tender be once made on the day appointed by the condition, and the mortgagee refuses it, the land will be for ever quit of the condition; and the mortgagor may hold it as before; but yet the mortgage debt remains, which the mortgagee may, at any time, recover by action of debt. Lit. sect. 538. Co. Litt. 209 b. Gilb. For. Rom. 311. And if a person, without any loan, debt, or duty preceding, make a gratuitous mortgage, and afterwards tenders the money on the day, which the mortgagee refuses, the mortgagee will be without remedy. Co. Litt. 209 b.

Tender in performance of conditions.

P. 937
continued.

tents money, if accepted *without objection* as such, and on that ground held that the memorial was good.

Tender of bank notes should be accompanied with offer to turn them into money (T).

But Mr. Justice Buller observed, that although bank notes were considered in this light in the Court of King's Bench, yet in a case on the other side of the hall, the Lord Chancellor once suggested a doubt, whether these kind of notes were money; therefore it is most prudent, in making a tender of them to a mortgagee, to offer to turn them into cash, which if not required, clearly gives validity to the tender; for as the consequence of a refusal, if the tender be legal, is *penal* to the mortgagee, a court of equity would be inclined to seize upon any omission, by which a mortgagor, so circumstanced, might escape from the rigour of the law.

Tender must be made by person interested (T 2).

A tender must be made by a person actually interested; and accordingly, it was said by Croke to have been adjudged, Trin. 27 Eliz. that, where one tendered money upon a mortgage for an infant, who was not guardian, nor was to have any interest in the land, it was adjudged a void tender (k).

[939]

By guardian of infant good, when.

The above case is reported more at large in Owen (l), by the name of *Watkins v. Astwick*, and is thus stated: A man

(k) *Watkins v. Ashwicke*, Cro. Eliz. *Loveday*, Owen, 34; and *Cropp's case*, 132. [S. C. 1 Leon. 34. Moor, 322, Godb. 39.—Ed.]
and Owen, 137. S. L. *Winter v.* (l) Owen, 137.

(T) The necessity of this precaution must be now superseded by the above definitive adjudication in the King's Bench. It is a precaution which may be productive of great inconvenience, and perhaps expence, in times of scarcity of cash; for if the mortgagee should close with the offer to turn the paper into specie, all the trouble which the procuration of the notes was intended to obviate, would be incurred, and if the mortgagee does not himself object to the legality of the tender, why, it may be asked, should the mortgagor to his own prejudice pointedly raise the objection for him?

(T 2) It is extremely clear, that no one has a right to make a tender of the money due on a mortgage, except the one who can shew a title to compel a redemption; as to those who cannot shew such a title, the mortgagee has a right to refuse acceptance of the tender, and to insist on holding the possession. Per Lord Chancellor, 3 Swanst. 237. 241. *Lomax v. Bird*, 1 Vern. 182. *Bickley v. Dorrington*, Barnard. 32.

made a feoffment on condition, that if he, his heirs or executors, did pay one hundred pounds before such a day, that he might re-enter; the feoffor died, his heir within age; the mother, without any notice to the son, requested I. S. that he would pay the money for her son. All this was found by special verdict, but it was not found of what age the son was. Clinch said, that if the jury had found that the son was of the age of seventeen years, the payment had been good. But by Wray, if a bond be upon condition, that the obligor or his heirs shall pay 100*l.* and the obligor dies, his heir within age, I conceive payment by the guardian, or by some other friend, is good. And afterwards all the justices agreed, that if the infant were within the age of fourteen years, the tender of the money by his mother had been good, but otherwise if he had been more than fourteen years of age; and because no age was proved, but that he was within age, it should not be intended that he was within the age of fourteen years; and therefore they advised the party to begin *de novo*, and that it might be found that the infant was within the age of fourteen years.

The money being a sum in gross (*m*), and collateral to the title of the land, the mortgagor must tender it to the person of the mortgagor, and it is not sufficient for him to tender it upon the land (*u*). *Tender must be made to person of mortgagor.*

(*m*) Co. Litt. 210 b. 2 Eq. Ca. Abr. 603. 34.

(*u*) Hence the necessity of appointing a certain place for payment of the money in the proviso for redemption. Lord Coke adds, "but if the mortgagee be out of the realm of England, the mortgagor is not bound to seek him, or to go out of realm unto him; and for that the mortgagee is the cause that the mortgagor cannot tender the money, the mortgagor shall enter into the land, as if he had duly tendered it according to the condition," Co. Litt. 210. b, which principle may be attended with this consequence, that if the first mortgagee be out of the kingdom on the day of payment, and the mortgagor enters on the land, and after the day, assigns over to a second mortgagee who has no notice of the first mortgage; in such case it seems the first mortgagee would be postponed to the second, for the second has the legal estate and as much equity as the first, and then equity will not interfere. A proper precaution, therefore, for a mortgagee, going abroad before the day of payment, would be to appoint some person to receive the money at the time and place specified, of which appointment the mortgagor should have notice. *Mortgagee going abroad, should appoint person to receive money, if tendered at time.*

Unless time and place be appointed in deed. But, if a time and place for payment of the money be appointed, in that case he need not seek for the mortgagee (s), or be in any other place but in that comprised in the indenture, or *there* longer than the time specified therein.

Or mortgagor in giving notice of repayment, specifies time and place.

And so it is, although a place be not appointed in the proviso, if the mortgagor give notice *where* he will pay it off. Thus (o), where the mortgagor gave personal notice, in writing, to the defendant the mortgagee, that he would tender the money and interest between the hours of ten and twelve in the morning, at Lincoln's Inn Hall, at a day and hour appointed therein, which accordingly was done; it was objected that Lincoln's Inn Hall was not named, in the proviso in the mortgage-deed, as the place for payment, and therefore that the tender must be to the person; but it was held, that the money being lent in town, it would be very hard, after personal notice being given for payment thereof, and no objection made by the mortgagee to the place at the time of notice, to make the mortgagor travel with this sum of money to Oxford, where the mortgagee lived (u²).

Tender at mortgagor's house, when good.

In some cases, a tender at the house of the mortgagee will be sufficient (p). Thus, where there was a mortgage, and the mortgagor afterwards meeting the mortgagee, said to him, I have monies now, I will come and redeem the mortgage; to which the mortgagee replied, he would hold the mortgaged premises as long as he could, and then when he could hold them no longer, let the devil take them if he would.

(s) Co. Litt. 211 b. 212.

(p) *Manning v. Burgdes*, 1 Ch. Ca.

(o) *Gyles v. Hall*, 2 P. Wms. 378. 29.

(U²) A reasonable place should be appointed for payment of the money. In one case, a sum was charged on lands in Ireland, and the proviso stipulated that it should be repaid in Lincoln's Inn Hall, London. In the House of Lords, this part of the reservation was unattended to; and their lordships held, that the owner of the money was not entitled to have the sum transmitted to England, free of the charge of conveyance and exchange properly so called; for that in ambiguous contracts, the domicile of the parties, the place of execution, the purpose and the various provisions and expressions of the instrument were material to be considered in the construction. *Lansdown v. Lansdown*, 2 Bligh, 60.

Afterwards the mortgagor went to the mortgagee's house with money, more than sufficient to redeem, and tendered it there, but it did not appear that the mortgagee was within, or that the tender was made to him; the court decreed a redemption, and that the defendant should have no interest from the time of the tender, because of his wilfulness. And a like determination was [said to have been] made in the case of *Peckham v. Legay* (q).

But, if there be a deed of assignment presented to be executed, at the time when the tender is made, in which there are covenants, the mortgagee is entitled to lay them before his attorney, and shall have reasonable time allowed him so to do before the interest shall stop.

Interest stops after tender and reasonable time to peruse reconveyance.

Thus (r), where a bill was brought in May, 1742, to redeem a mortgage, in which the plaintiff insisted upon a redemption, on paying the principal-money only, for that the interest ought to determine in February, 1741, because he had given six months notice to pay it off, and had, on that day tendered the principal and interest, with a deed of assignment, but the defendant absolutely refused to take the money: the defendant swore, that he offered to take the money, provided he might have time to consider of it, and to advise upon the deed of assignment, there being covenants therein on his part, upon which, as he was not of the profession of the law, it was reasonable he should consult his attorney, whether they were such as he might safely execute. And the Lord Chancellor said, that the plaintiff, not having sent a draft of the assignment to the defendant any time before the money was tendered, as he ought to have done, was in the wrong; for where there were covenants on the part of the mortgagee, it was very reasonable that he should have some time to look them over; the plaintiff's attorney ought to have left the deed for a week with the defendant, that he might have had an opportunity to advise upon it, and should have appointed a time to pay the money, after the defendant had had sufficient time to consider it. And his Lordship decreed the mortgage-money, with in-

[941]
Mortgagee allowed a week at least to peruse draft assignment of mortgage.

(q) Cited in *Manning v. Burgess*,
1 Ch. Ca. 29.

(r) *Wiltshire v. Smith*, 3 Atk. 90,
[S. C. 9 Mod. 441.—Ed.]

terest, to be paid within six months, or otherwise the plaintiff's bill to stand dismissed.

Interest not stopped by tender, if right to equity of redemption be in dispute.

So, if there be a controversy, to whom the equity of redemption belongs, no assignment can be made until that point is settled (s): therefore the interest of the mortgage will not cease, although the money be tendered to the mortgagee, and he refuse it.

Rate of interest may be varied by subsequent parol agreement.

The rate of interest, originally reserved upon a mortgage, may be altered at any time by a parol agreement, without writing; notwithstanding the rule, that a parol agreement ought not to be admitted to contradict the terms of an agreement contained in a deed, or any other agreement in writing; for such subsequent transaction will not be considered in law as a *contradiction*, or *alteration*, of the original agreement, but as a *new subsequent parol* agreement; and nothing is more clear in law than that a written agreement may be waved in part, or in the whole, or be varied in the terms of it, by a subsequent parol agreement, made upon a new and good consideration, if the subject-matter of the latter agreement doth not require that it should be in writing.

[942]

Milton v. Edgeworth.

Thus, where Lord Milton (t), being possessed, under a conveyance from his father, of divers mortgaged premises, and all the securities for the same, and entitled to all the money due thereon, filed his bill in the Court of Exchequer in Ireland, in June, 1764, against Moore Edgeworth and Damer Edgeworth, infants, heirs to the mortgagor; praying the benefit of the proceedings in a former cause, and for an account; and that the money which should appear due thereon might be paid by the plaintiff by a short day, or that the defendants might be foreclosed, and the mortgaged premises sold, for payment of what should appear due.

The defendants, by their answer to this bill, admitted most of the matters therein stated; but insisted upon the benefit of an agreement, which they alleged had been made between

(s) *Sharpnell v. Blake*, 2 Eq. Ca. Abr. 603, pl. 34.

(t) *Milton v. Edgeworth*, 6 Bro. P. C. 580.

the plaintiff's father, John Damer, and the father of the defendants, for reducing the interest of the said mortgages, which, by the deed, was originally at 8 *per cent.* to 6 *per cent.*

Issue being joined in the cause, several witnesses were examined; and the same came on to be heard in November, 1771: when (upon reading an answer put in by the said John Damer, in 1758, to a bill, filed against him by the defendant's father in 1757, whereby the former admitted, that, pending a former suit, the said defendant's father had told the said John Damer, "That the debts, affecting the estates mortgaged, were so great, that if John Damer did not make an abatement in the interest of the money due to him, he would have little benefit in case he succeeded in the said suit," and that Damer then said, "that if that should be the case, he would leave any reasonable abatement to his friend Ambrose Harding."—Whereby it appeared, that such conversation had passed between them; and that the said Ambrose Harding understood that Damer had agreed to accept of 6*l.* *per cent.* interest upon the money so due to him on the said securities; and also upon reading other evidence) the court made an order directing an issue to be tried at the next assizes, "whether there was any, and what agreement between John Damer, Esq. deceased, and Packington Edgeworth, deceased, at any, and at what time, for any, and what abatement of interest, on the principal sums due to the said John Damer?"

And issue will be directed to try existence of such agreement.

From this order Lord Milton appealed to the House of Lords, and the principal objection urged by him against directing such issue, was, that considering the state of the evidence before the court, it was unjust to direct an issue; because the answer of Mr. Damer, which was read by the defendants at the hearing, denied any agreement between him and Packington Edgeworth, to reduce the rate of interest; and this denial, being set in opposition to any conclusion drawn from Harding's evidence, took away all ground for the court's interposing; whereas, by directing an issue, upon the trial of which Mr. Damer's answer could not be read for the appellant,

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he would be deprived of that evidence which the defendants had made evidence at the hearing of the cause.

But it was adjudged, that the order should be affirmed, with this addition, *viz.* that the plaintiff should be at liberty, at such trial, to read the answer of Damer.

Interest on mortgage money in settlement, apportioned, in case of tenant for life's death.

Interest due on mortgage money, which is a settlement (u), will not be considered as in the nature of rent, and consequently go with the mortgage; but if the tenant, under the settlement, die in the broken part of the quarter or half-year, the interest will be apportioned; and what is due from the last day of payment to the day of the death of the tenant for life, will be paid to his executor, and the residue to him in remainder.

Interest increases daily.

The reason is (x), that interest increases on a mortgage from day to day; and the mortgagor, whenever he pays the principal and interest, must pay the interest up to the day of payment.

Interest and dividends distinguished.

In this (y) a mortgage likewise differs from stock; for dividends upon stock are by the legislature made payable only half-yearly, and are in nature of rents, and consequently not liable to apportionment.

Usurious taking proveable by parol.

On the statute 12 Anne, stat. 2. c. 16. s. 1 (z), which enacts; "that all bonds and assurances for the payment of any principal, or money to be lent upon usury, whereupon there shall be reserved or taken above five pounds in the hundred, shall be utterly void;" parol evidence has been admitted to shew usurious interest taken by a mortgagee, though there was none reserved upon the face of the deed itself (w).

(u) *Edwards v. Countess of Warwick*, 199.—Ed.]

2 P. Wms. 171.

(y) *Wilson v. Harman*, 2 Ves. 673.

(x) *Wilson v. Harman*, 2 Ves. 673.

(z) *Adlington v. Cann*, 3 Atk. 154;

[*S. L. Wads v. Wilson*, 1 East Rep. [S. C. ante, 893.—Ed.]

Borrower may prove usury.

(W) And it has been decided, that the person who borrows the money on an usurious transaction, will be a competent witness for the plaintiff in an ac-

tion for penalties against the lender; and whether he has, or has not, repaid the money lent, does not appear to make any essential difference, at least so far as his competency is affected; for in neither case does he gain any thing immediately by the event of the suit, nor can he give the judgment in evidence in an action against him for the money lent. *Abraham v. Burn*, 4 Burr. 251. *Smith v. Proger*, 7 T. R. 60. *Masters v. Drayton*, 2 T. R. 486.

On the subject of this chapter the following observations remain to be made, *Interest reduced in time of national calamity.*
 1st. Where by a general and national calamity nothing is made out of lands assigned for payment of interest, it has been held, that it ought not to run on during the time of such general distress. *Basil v. Acheson*, 15 Vin. Abr. 474. On this principle interest was moderated in *Parter and Hubbard's case*, 3 Ch. Rep. 79, on account of the badness of the times between the years 1642 and 1648; and, in the *Earl of Derby's case*, it is said to have been entirely taken away. 15 Vin. Abr. 474. The national calamity here alluded to was, in all probability, that which arose from the civil wars during the latter end of the reign of Charles I.

2d. Taking a bond for an arrear of interest does not discharge the land, *Taking bond for arrears, and giving receipt, no discharge of land.* but operates only as a further security to the mortgagee. *Barrett v. Wells*, Pra. Ch. 131. Therefore where Mrs. Skinner, a mortgagee, having a great arrear of interest due upon her mortgage, in 1778, accepted a bond from William Mynd, the bankrupt, for the payment thereof with interest, and at the same time indossed upon the mortgage deed a receipt for all interest up to that time. The interest was held still secured by the mortgage, and, after a poudage under the bankruptcy, Mrs. S. was held entitled to recover the deficiency on the estate. *Hardwicks v. Mynd*, 1 Anstr. 111. So in a later case it was held, that a bond from the owner of an estate charged, to the person entitled to the charge, who signed a receipt for the amount, was not a substitution for the charge, but merely an additional security, and the estate not thereby released. *Scummers v. Leslie*, 3 Ball & Bea. 509. It is also observable, that it is not incumbent on the creditor to prove that it was not the intention of the parties to this transaction that the bond should be a substitution of the charge, but it lies in the owner of the estate to make out that the estate is discharged. *Ibid.* Et vide *infra*, 1062, as to cases of equitable lien. In like manner where the plaintiff, holding a bill of exchange as a security from three partners, after the dissolution of a co-partnership, and after the bankruptcy of one of them, took the notes of one of them as a collateral security, without the knowledge of the other partners, and retained the original security in his hands; it was held, that this did not discharge the other partners. *Bedford v. Denkin*, 3 Stark. 178. But if a mortgagee take a bond from a tenant for life, knowing him to be such, for the arrears of interest, he cannot, as against the remainder-man, charge the estate with the arrears. *Lofus v. Swift*, 2 Sch. & Lef. 642. *S. C.* ante, vol. i. p. 392, *in notis*.

3d. The principal sum secured by deed, *Principal and interest distinct debts, though secured on same fund.* and the interest stipulated to be payable thereon, are two distinct sums, and not one entire sum, and either may be sued for, independently of the other, at the election of the party, and by different remedies. *Dickenson v. Harrison*, 4 Price, 282. But Wood, Baron, said, if part of the debt be sued for, it must be averred on the declaration that the rest has been satisfied, *ib.* 287. Notwithstanding however that the

principal and interest are separate debts, yet are they both parts of the same fund, and alike secured on the credit of the land. *Shafte v. Shafte*, 2 P.Wms. 664, n. 1 Ves. 53. 3 Meriv. 566.

Money paid generally, applied in liquidation of interest.

4th. Seeing the mortgage is given as a security, not only for the principal debt, but also for the interest, if any remains due; and that the interest is a recompence for the loss which the creditor sustains by the debtor's delaying to acquit the principal debt; the monies which may be raised from the fruits of the thing mortgaged must be applied, in the first place, to the discharge of the interest, for the debtor must begin with indemnifying his creditor for the damage he has sustained by this delay. Thus the civil law enacts, that *cum et sortis nomine et usurarum aliquid debetur ab eo, qui sub pignoris pecuniam debet: quidquid ex venditione pignorum recipiatur primum usuris quas jam tunc deberi constat, deinde si quid superest sortis accepto ferendum est.* Dig de pignor, act ff. Lib. 35. Agreeably to this rule, we find it laid down in *Chan v. Box*, 2 Freem. 361, that where one person is indebted to another for principal and interest, and pays him money generally, such payment shall be applied in sinking the interest before any part of it is applied in discharge of the principal. But if at the time of payment he that receives the money declares that he receives it on one account, and he that pays it declares that he pays it on another, the declaration of the payer will be preferred, for the rule of law is, *quicquid solvitur, solvitur secundum modum solventis.* This latter rule seems to have been uniformly received in our courts in England. It was fully acknowledged in *Anon. Cro. Eliz.* 68, pl. 18; *Pinner's case*, 5 Co. 117; and *Prowse v. Worthing*, 2 Brownl. 107. So in *Booth v. Booth*, 8 Mod. 242, the court inclined to the opinion, that the sum then paid should be applied first in discharge of the interest, and then the residue in payment of so much of the principal. And where the question in dispute was respecting a judgment which had been given for principal and interest due on a bond, the court decreed, that whatever sum the creditor had received before the judgment was entered into, should go in discharge of the interest, and whatever he might have received after the judgment was given, should go, in the first place, to discharge the interest, and then to sink the principal. *Crisp v. Black*, Finch, 89. Moreover it was in another case held, that where a man is indebted to another on two accounts, the one by mortgage and the other by simple contract, if he pays money generally, it will be taken to be paid in discharge of that debt which carries interest. 9 Mod. 427. But where two debts are consolidated, the one bearing interest and the other not, the general payment will be presumed to be made in liquidation of both debts proportionably. Thus where A. was indebted to B. by bond, and C. was bound as surety for him, and A. was likewise indebted to B. by simple contract in other money, and A. and B. came to an account of both debts, and stated them to amount to 84*l.*; and afterwards A. in satisfaction of this debt made over to his creditor certain goods of less value, without any declaration whether the produce of such goods was to be in part payment of the one debt or the other. C. the surety, insisted that it should be taken as paid on the bond, but B. the creditor, would have it applied in satisfaction of the simple contract debt; for A. was insolvent, and therefore, if it were not so applied, he might lose his debt on simple contract, contending that he had a right to apply the general payment to what debt he pleased; and that it would be hard, where he had a just debt in law and

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Two debts consolidated, one bearing interest, other not, general payment to be in equal proportions.

equity, he should be expounded out of it by interpretation of a payment generally made: *Et per curiam*, this payment being pursuant to a precedent account of both debts, the payment shall be intended according to the account, namely, on both debts, and so shall be proportioned rateably on both debts; and an order of the Master of the Rolls to that effect was confirmed on the re-hearing. *Perrie v. Roberts*, 2 Ch. Ca. 83. S. C. 1 Vern. 34. If a person has two demands, one recognized by law, the other arising on a matter forbidden by law as usury, and an unappropriated payment is made to him, the law will afterwards appropriate it to the demand which it acknowledges, and not to the demand which it prohibits. *Wright v. Laing*, 3 Barn. & Cress. 171. The general rule is, that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say, to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. But there is a third rule, viz. that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In that case, it is to be presumed, that all the parties have consented that it should be considered as one entire account, and that the death of one of the partners has produced no alteration whatever. Per Bayley, J. in *Sinason v. Ingham*, 2 Barn. & Cress. 72. So in another case it was laid down, that where there is a general running account, and no intermediate rest, and the debtor remits money without any specific appropriation, it is *prima facie* a payment in liquidation of the earliest balance due from the debtor; and under such rule remittances made by C. D. to his London bankers generally, after the death of A. B., have been held applicable, in the first place, to the liquidation of the partnership balance due at the death of A. B. *Sinason v. Cooke*, MS. C. P. Feb. 7th and 9th, 1824.

On this principle it has been held, that where a purchaser pays part of his purchase-money generally to a creditor of the vendor by judgment or other security affecting the land, and also by bond or other security which does not affect the land, it will be considered as a payment in satisfaction of the judgment or other incumbrance which charges the estate. *Brett v. Marsh*, 1 Vern. 468. But this rule seems different at law, see *Goddard v. Cox*, 2 Stra. 1194. A. having a legal claim against B. on bills of exchange accepted by B., and having also possession of a deed of mortgage, executed by B. to a third person, of which he might compel an assignment in equity; B. pays money to A. on account, without prejudice to his claim on any securities, the law will apply the payment to the bills of exchange. *Birch v. Tebbutt*, 2 Stark. 74.

General payment referred to judgment in preference to bond.

5th. The devise of an equity of redemption will not be entitled to have an arrear of interest, upon a legacy from the mortgagee to the mortgagor, set off against the interest due on the mortgage. *Pettit v. Ellis*, 9 Ves. 563. So we have seen (ante, vol. i: 299, in *notis*) that a second mortgagee, being also the tenant in possession, will not be allowed to set off his rent against the interest due on his mortgage, but that he must first pay it to the receiver, who will apply it in payment of interest on the first incumbrance, and return him the

Set-off.

*Of interest
where mort-
gagor is bank-
rupt.*

residue (if any) in payment or part payment of the interest on his second mortgage.

6th. Where a mortgagor becomes bankrupt, and the mortgage is inadequate to the payment of principal and interest, the mortgagee will be entitled to interest up to the date of the commission only. But if the mortgage be a sufficient security, the assignees will not be permitted to redeem without paying interest up to the time of redemption, or rather up to the time of payment of the principal. *Badger, Ex parte*, 4 Ves. 165. *Wardell, Ex parte*, 1 Cooke's Bank. Laws, 195. 7 Vin. Abr. 110. B. a. pl. 1 and 5. If the produce of the estate will be sufficient to pay the principal and interest beyond the date of the commission, but not to the time of the sale, the mortgagee will be entitled to the whole up to the day of redemption, but he will then have no right to prove any thing under the commission, 2 Chris. Bank. Law, 378. In the case of a deposit, as a security for a debt, no interest will be allowed, if the debt without the deposit would not have carried interest. *Haigh, Ex parte*, 11 Ves. 403.

7th. The arrears of an annuity accruing subsequently to the commission, are not the subject of proof. *Slack, Ex parte*, 1 Glynn & Jam. 346. But this is not so with interest on a mortgage, which runs on up to the day of payment of the principal, and comes in immediately after payment of the expences of the sale. *Ib.*

8th. A purchaser of an estate by public auction deposited a sum with the auctioneer as part of the purchase-money until the vendor made out a good title according to the conditions of sale. No good title was made out, but the treaty was kept open with the auctioneer for four years from the time of the sale, during which time no demand had been made on him for the deposit: It was held, that in such case the auctioneer was not liable to the purchaser for interest on the deposit money. *Lee v. Murin*, 8 Taunt. 45.

CHAP. XX.

OF THE METHOD OF ACCOUNTING.

THE land upon a mortgage being generally left in the management of the mortgagor, and the conveyance thereof rather looked upon as collateral security for the due payment of the money lent and interest, than as an actual alienation; the mortgagee is considered as having no right to meddle with the rents and profits, until after he has taken possession thereof (a) (A). *Mortgagee no right to rents till in possession.*

There is no instance of the mortgagor being obliged by the court to account to the mortgagee for the rents and profits for any of the years back, during which he hath been in possession; for if the interest be not paid, the mortgagee ought to take the legal remedy to get the possession himself (aa). *Mortgagor not accountable to mortgagee for by-gone rents.*

(a) Vide *Moss v. Gallimore*, ante, (aa) [See ante, vol. i. 177, in the [vol. i. 174, and] *Mead v. Orrery*, text.—Ed.]
3 Atk. 244. 2 ib. 107.

(A) Admitting the decision of *Moss v. Gallimore* to be sound law, Lord Eldon, in a recent case said, he had often been surprised by the statement, that a mortgagor was receiving the rents for the mortgagee. This was one of those cases, which had led Lord Eldon to doubt whether Lord Mansfield was not sometimes applying as the doctrine of a court of equity what never had been so. Lord Eldon further observed, that in the instance of a bill filed to put a term out of the way which might be represented as in the nature of an equitable ejectment, the court would in some cases give an account of the past rents, but a mortgagee never could in the Court of Chancery make the mortgagor account for the rents for the time past. There was not an instance, his Lordship added, where a mortgagee had *per directum* called upon the mortgagor to account for the rents. The consequence was, that strictly speaking, it was incorrect to say that the mortgagor had received the rents for the mortgagee; *Wilson, Ex parte*, 2 Ves. & Bea. 252. In confirmation of this view of the subject, it was held, in *Gresley v. Adderley*, 1 Swan. 579, that a mortgagee for a term which is expired, is not entitled to a retrospective account of the rents and profits which accrued due before the expiration of the term; see S. L. ante, vol. i. p. 303, in *notis*; s. ix. 3, et vide *infra*, 1198, et seq. *Mortgagee not entitled to account of past rents from mortgagor.*

Not even where security was of expired life estate.

This principle is so strictly adhered to, that the court would not dispense with it even in the case of a security upon an estate for lives, which was become insufficient (b).

Mortgagee in possession must account.

If the mortgagee enters upon and takes possession of the estate (c), he becomes in the nature of a bailiff to the mortgagor (cc), and will be subject to account for the profits (B).

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Notwithstanding agreement for retaining profits against interest.

So, if the mortgagee be put into immediate possession, and the profits of the estate evidently exceed the amount of the interest, the mortgagor may exhibit his bill for an account.

Thus, where M., seised of an estate for life (d), joined with her son, who had the inheritance, in a conveyance by a deed

(b) *Coleman v. Duke of St. Alban's*, that mortgagees were but bailiffs to the mortgagor. *Roscarrick v. Barton*, 3 Ves. 25.

(c) *Gould v. Tancred*, 2 Atk. 534. 1 Ch. Ca. 220. S. C. infra, page 973.—

(cc) [Lord C. J. Hale, assisting the Lord Keeper, thought it a great sore Ed.]
(d) *Fulthorpe v. Foster*, 1 Vern. 476.

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(B) In *Holman v. Vaux*, (Toth. 101. 230, p. 133, edition 1820,) the mortgagee in possession was decreed to account for the profits received and for the use of those profits; but this is not the present method of calculating the account; see *Davis v. May*, Coop. Rep. 299. S. C. infra, 957, 8, *in notis*.

Duty of Master in taking *ex parte* account.

The account is taken before a Master in Chancery, and it is his duty where the parties who might resist the claim do not attend, to take the account with as much care as if they did; and even with more jealousy; for when the parties do appear, it is expected that they will attend to their own business. A decree taken *ex parte*, is taken at the peril of the party who obtains it; if he cannot support it by his pleadings and proofs, it is not a judgment pronounced by the court, but it is the act of the party conceiving what the judgment of the court would be if the other party had appeared. The same may be said of an account made by the Master attended by one party only; and Lord Redesdale, in a late case, expressed his fears that mortgage accounts were too often taken where one side only was present. *Carew v. Johnstone*, 2 Sch. & Lef. 300.

In a late case a remote remainder-man redeemed a mortgage, and by that means got into possession. It was then contended that he was in possession as owner. The court however observed that no two things could possibly be more distinct or opposite, than possession as mortgagee, and possession as owner of the estate; nor could any thing be more hazardous or inconvenient than the possession of a mortgagee; the manner in which he was called to account being most rigorous and severe. *Blake v. Foster*, 2 Ball & Bea. 403.

that was absolute of lands of 4*l. per annum*, and a profit out of some coal-mines, which, *communibus annis*, were worth nine pounds, to secure ninety pounds; and the vendee was immediately put into possession, but on a proviso, that if the son should pay the money at the end of ten years, the vendee should re-convey to him. On a bill brought to redeem, the only question was, whether the defendant should retain the profits in lieu of the interest, or should account for what he had received out of the estate? It was insisted for the vendee, that the mother, who had parted with the estate for life, had the most reason to complain, and that she was content the defendant should have the profits in lieu of the interest: that the son had a good bargain of it, for he had got to himself his mother's estate for life, and that it was in the nature of a Welch mortgage, where the mortgagee is put into possession immediately, under a proviso to have a re-conveyance on payment of the principal money, in which case the profits always go against the interest; that this case was stronger, by reason that here the profits arising out of the coal-mines were more uncertain than the profits of lands. But the Master of the Rolls was of opinion, that the profits being 13*l. per annum*, it was altogether unjust and unreasonable that the same should go in lieu of the interest of 90*l.*; and that even in Welch mortgages, if the value was excessive, the court would decree an account, notwithstanding there might be an agreement for retaining the profits against the interest; and a re-conveyance was decreed on payment of what should appear due, discounting the profits received (c).

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(C) This was not exactly the case of a Welch mortgage, for there the excess of rent beyond the interest is carried to a liquidation of the principal; but from the expression of the court it may be inferred, that after a Welch mortgagee has been paid his principal, interest, and costs, he will be compelled to account for by-gone rents, though it might have been the case of a life estate, which has determined by the extinction of the life. But it is apprehended, that the court would not direct annual rests in these cases according to the rule laid down, *infra*, p. 957, 8.

No annual rests in Welch mortgages. Senb. But mortgagee must account for surplus in his hands.

In a late case a mortgagee who was in receipt of rents and profits, under a covenant that he should receive them till his debt was satisfied, having received more than his debt, and retained the overplus in his hands for a considerable

With interest after notice of subsequent claims.

Mortgagee in possession allowed nothing for trouble, but he may employ bailiff.

Where mortgagees or trustees manage the estate themselves, there is no allowance to be made them for their care and pains (c); but if they employ a skilful bailiff, they will be allowed such sums as they have paid him; for a man is not bound to be his own bailiff (d).

(c) *Bonithon v. Hockmore*, 1 Vern. 316. 3 Atk. 518.

time, was ordered to pay it in with interest on the amount and on the annual balance in his hands, from the time of his receiving notice from a subsequent mortgagee that he should hold him chargeable with interest unless the money received were paid over in aid of the other incumbrancers. The rate at which such interest was ordered to be paid was 4l. per cent. The court will require a very strong case to be made out against a party who is required to pay 5l. per cent. The present case, on the facts stated in the Master's Report, was not considered sufficient to justify a departure from the rule as to the usual rate of interest adopted by the practice of courts of equity: and the time for which such interest was ordered to be calculated, was from the receipt of the notice by the subsequent incumbrancer that interest would be demanded, to the time of the defendant paying it in. 12 Price, 353. Where the subject-matter is of small amount the court will not take into consideration the question of interest, lest the necessary inquiry should lead to an expence that would exhaust the principal, which is the object of it. *Archdeacon v. Bowes*, 13 Price, 353.

Account of mortgagee and receiver distinguished.

(B) It has long been determined in Chancery, that though a mortgagee may stipulate for a receiver to be paid by the mortgagor, and may appoint a bailiff, he cannot stipulate for any advantage to accrue to himself beyond the interest, and though it seems to make little difference to the mortgagor who is receiver, yet this court considers it as tending to usury and oppression, and a collateral advantage, which a man contracting for a loan of money, shall not make. So, if a mortgagee stipulates to enter and take possession as trustee, and do a variety of acts which he ought to do, whether he stipulates or not, he not only shall not have any advantage from it, but his stipulating for it might perhaps affect his right to the money lent. Upon the general rule also, independent of contract, a mortgagee or trustee cannot charge any thing beyond what he paid to the person for whose estate he is accountable. *Chambers v. Goldwin*, 9 Vea. 372; et vide, ante, vol. i. 296, 7, for cases where a mortgagee will be allowed in account, the salary of a receiver or collector of his own appointing. In *Trimleston v. Hamill*, 1 Ball & Bea. 377, this distinction was taken by Lord Mansfield, that a creditor in possession under a power of attorney may account as a receiver, which will entitle him to a salary for his trouble; but if such creditor take an assignment of a mortgage as a further security, he must thenceforth account as a mortgagee.—A trustee, though he acts, is not to be charged as a mortgagee for what he might have received, but only for his actual receipts; for he might have moved for a receiver. *Harnard v. Webster*, Sel. Ca. Ch. 53.

And though there be a private agreement between the mortgagor and the mortgagee (*f*), for an allowance for the mortgagee's trouble in receiving the rents and profits of the estate, yet the court will not carry it into execution, for equity will not allow him any more than his principal and interest.

Agreement that mortgagee shall be allowed for trouble, inoperative.

If a mortgagee in possession assign over his mortgage, without assent of the mortgagor, to an insolvent person, the mortgagee will be bound to answer the profits, both before and after the assignment, though assigned only for his own debt (*g*); for he is under a trust to answer the profits of the pledge, and it is a breach of trust to assign such pledge to an insolvent person. But *quære*, if the mortgagor concealed himself, so that he cannot be served with a *subpoena* to foreclose, whether the mortgagee may not assign, and not be answerable for the profits after assignment? (*gg*)

Mortgagee in possession assigning without mortgagor's assent, answerable for future rents.

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A mortgagee will not be obliged to account according to the value of the lands (*h*), *viz.* he will not be bound by any proof that the land was worth so much, unless it can likewise be proved, that he actually made that sum of it, or might have

Mortgagee in possession accountable for what he has received only; but answerable for fraud and wilful neglect (&c.).

(*f*) *French v. Baron*, 2 Atk. 120.

subpoena, *infra*, 981, 2, in *notis*.—Ed.]

(*g*) 1 Eq. Ca. Abr. 528, pl. 2. 2 Ch. Ca. 3. 3 Bac. Abr. 658.

(*h*) *Anon.* 1 Vern. 45. 1 Ch. Ca. 258. 1 Eq. Ca. Abr. 328. 1 Vern. 476.

(*gg*) [See, as to the service of the

3 Bac. Abr. 687, 8.

(E) The above is the general rule, the position in the next paragraph but one forms an exception. Similar doctrine prevailed in the civil law. Thus, in the Pandects, *contractus quidam dolum malum duntaxat recipiunt; quidam et dolum et culpam—dolum et culpam mandatum, commodatum, venditum pignori acceptum*, (lib. xxiii. de reg. jur.) *Venit autem in hac actione et dolum et culpa, ut in commodato, venit et custodia*, ib. lib. xiii. de pign. act. But not only would the creditor be answerable for the losses and damages which he might have caused by his own act and deed; he was likewise accountable for what happened through any negligence, or fault which a careful and circumspect person would not readily have been guilty of. *Ea igitur quæ diligens paterfamilias in suis rebus prætare solet, à creditore exiguntur*, eod. lib. xiv.; and again, lib. xxiv. in pignoratitio judicio venit, et si res pignori datas malè tractavit creditor vel servos debilitavit.

Coincidence of English and civil law.

done, had he not been guilty of fraud or wilful default (E2); as, if he turned out a sufficient tenant, that held it at so much rent, or refused to accept a sufficient tenant, that would have

Creditor answerable for judgment of third person assigned to him by debtor as a security, if he delays to proceed, whereby judgment is lost.

(E2) A. assigns to B. as a security for a debt due to him from A. a judgment recovered by A. against C.—B. sues out execution upon the judgment, but instead of levying the whole amount, enters into a negotiation with C., and receives part of the sum due upon the judgment, but C. having become insolvent before the residue could be obtained, the question was, whether A.'s executors (A. himself being dead) were still liable. The Vice-Chancellor held, that B. be restrained from suing A.'s representatives for the residue, and that B. account to A.'s representatives, not merely for what he received upon the judgment, but for what without his wilful default he might have received. *Williams v. Price*, MSS. Mar. Feb. 1823. In the course of his judgment, his Honor said:—"On fully considering the subject, it does not seem to me necessary to decide what degree of diligence a creditor is bound, on the principles of this court, to be held to, who accepts from his debtor, by way of collateral security, the assignment of a judgment debt against a stranger. I am not now called upon to determine whether a creditor so taking the assignment of a judgment debt, is to use legal diligence against the debtor, or whether he is to be permitted to be wholly passive, till his debtor who assigns the debt to him calls on him to take proceedings. There is great reason for maintaining that a creditor who takes such an assignment is not bound to use legal diligence; for to hold otherwise, would be to compel him to put the assigned security always in force by process of law, and to spend his own money in search of a benefit which he might never derive. The question here, however, is not whether B. was bound to use legal diligence; for he has used legal diligence. He has assumed the control of the debt; he has taken, what may be called figuratively, the possession of this debt; he has not left it subject to the disposition of A. or his executors. Now, whenever a creditor assumes possession of a collateral security, he is bound to conduct himself, so as to recover all that a provident owner would with diligence recover. He imposes on himself the duty of a provident owner. A mortgagee, taking an estate by way of collateral security, is not bound to enter into possession of that estate, whether it be a security proceeding originally from his mortgagor, or a security made to his mortgagor and by that mortgagor assigned to him. But if once he does take possession of the estate, thereby assuming the control and possession of the property thus conveyed to him by way of security, he is held to exercise the diligence of a provident owner. Hence, he is directed to account, not for what he has actually received, but for what he might have received without his wilful default; and this is the direction introduced into all decrees against him, even where no case, standing upon special circumstances, is made. When B. took out execution upon this judgment, he assumed the control and management of the property; and he has therefore bound himself to account to A.'s representatives in respect of the debt, not merely for the 300*l.* (which he actually received but for all that without his wilful default or neglect he might have received.) I do not hold that he is affected by those principles of giving time

Mortgage account.

given so much for it; for it is the *laches* of the mortgagor that he lets the lands lapse into the hands of the mortgagee by the non-payment of the money, and when it doth, he is only a bailiff for what he doth actually receive, but is not bound to the trouble and pains of making the most of what is another's.

If the mortgagor make proof that the estate was let at *such* a price whilst in the hands of the mortgagee, that will be deemed the rate at which it was let the whole time, unless the mortgagee shew the contrary, which it is in his power to do as being let by him (i) (f).

Mortgagee charged according to mortgagor's proof of rent.

But, if the mortgagee enter upon the estate, and thereby keep other creditors [*read* incumbrancers, of whose liens he has notice] out, he will be charged with all the profits he hath, or might have received after this entry (k). Thus, where a

Mortgagee in possession charged with what he might have received as against other

(i) *Blacklock v. Barnes*, Sel. Ca. Ch. Abr. 658. [The above are the usual words of the decree, see *Bulstrode v.*

(k) *Coppring v. Cooke*, 1 Vern. 270. *Bradley*, infra, page 959, n. (a), and *Benham v. Haincourt*, Pre. Ch. 30, *Harvey v. Tebbutt*, 1 Jac. & Walk. 203. [S. C. ante, pages 653, 932.] 3 Bac. —Ed.]

which apply to the relation between surety and principal. Where time is given to the principal the surety is discharged; because the surety could not in the interval enforce the demand against the principal. These doctrines have no application here. A creditor, taking property by way of collateral security, is not bound by time in that sense of the phrase. He is bound only by his wilful default and neglect. The decree which I shall make here will in truth be the same as was originally made in *Mure, Ex parte*, 2 Cox, 63. The directions there given, were, that it should be inquired what the creditors, who had taken the assignment, had received, or without their wilful default or neglect might have received. But, at the same time that I follow the decree, I must add, that I do not adopt throughout all the language which the great judge who decided that case used, or is said to have used, in giving his opinion upon it. The modern doctrine of the court would occasion much difficulty in adopting all that is there said.—A reference was accordingly made to the Master, to inquire what B. had received, or without wilful default or neglect might have received, in respect of the judgment against C., and he was restrained from suing A.'s representatives in the interval. *Ib. Et vide S. C.* 1 Sim. & Stu. 581.

(F) If a mortgagee enter into possession of the lands, he will be charged with the utmost value they are proved to be worth; but if he enter into receipt of the rents he will be obliged to account after the rate of the rent reserved only. *Trimleston v. Hamill*, 1 Ball & Bea. 385.

incumbrancers
(a).

mortgagee had obtained judgment in ejectment, and entered on the mortgaged estates, and thereby prevented other creditors that had subsequent securities from entering, and yet permitted the mortgagor to take the profits; on a bill by the

(G) See a similar law, ante, vol. i. 292, and post, 1006, in the notes and text. The general rule is mentioned above in the text. When a purchase is completed the vendee is entitled to the rents and profits of the estate till possession is given, and the vendor to his purchase-money, with interest; and if, by the neglect of the vendor no rents and profits have been received, he will be liable for what he might have received, unless the purchaser has taken possession. *Aeland v. Gaigford*, 2 Madd. Rep. 28.

Mortgagee in possession not entangled with minute inquiries, whether other persons would not have given more than his tenants.

In *Hughes v. Williams*, 12 Ves. 493, exceptions were taken by a mortgagor to a report, 1st. That the Master had charged the plaintiff, a mortgagee in possession personally, and by a receiver under his own appointment, with the rents actually received, whereas he ought to have been charged with the improved rents, at which the estate had since been let by a receiver appointed by the court, and which ought to have been obtained by the plaintiff or his receiver but for their wilful neglect or default: and 2d. That the Master had allowed the plaintiff the sum of 68*l.* for opening a slate quarry, when the only benefit accruing to the estate thereby was the sum of 2*l.* charged to the plaintiff's account, as the produce of the slates. The defendant was out of possession long before the plaintiff entered: prior mortgagees having been in possession, whom he paid to prevent foreclosure. Lord Erskine, in delivering his judgment, would not say that to charge a mortgagee in possession actual fraud was necessary; it was sufficient if there were plain, obvious, and gross negligence in the mortgagee, by not making use of facts within his knowledge: so as to give the mortgagor the full benefit of them;—as if the mortgagee had turned out a sufficient tenant, and having notice that the estate was under-let took a new tenant; another person offering more:—an offer however not to be accepted rashly. But the present case, his Lordship said, did not furnish even that ground; for, with the exception of a proposition to give 7*l.* a-year for one tenement instead of 5*l.* a-year, there was no proof of any proposal for an increase. A reason also was assigned for not accepting the proposal in that instance; namely, that the tenant was in arrear: and the plaintiff was apprehensive of losing that arrear. Another circumstance was, that the mortgagor if he knew the estate was under-let ought to have given notice to the mortgagee, and to have afforded his advice and aid for the purpose of making the estate as productive as possible. If he communicated to the mortgagee plans of improvement in his contemplation, which were disappointed by the embarrassment of his affairs, the court might take a stricter view of the mortgagee's conduct. In this instance, not only such notice was not given, but during a whole period of sixteen years, while the mortgagor was out of possession, he never stated, that the estate was not managed as it might be. Could the mortgagor then (Lord Erskine asked) lie by, not giving notice that a greater rent might be made, and come afterwards by way of penal inquiry, to charge the mortgagee with the effect of his own negligence. The principle was, as

other creditors to redeem him, the court ordered, that the mortgagee should be charged with all the profits he had, or might have received after his entry.

stated by the Solicitor-General, that it would be dangerous to say the mortgagee was not answerable except for fraud, for if such gross negligence could be shewn as came up to the description of wilful default, he ought to be answerable for it.

Mortgagee answerable for fraud and gross negligence.

But Lord Erskine determined the first exception upon the principle, that a mortgagee, taking possession, was to take the fair rents and profits, and was not bound to engage in adventures and speculations for the benefit of the mortgagor; but he was liable only for wilful default, of which, in this instance, there was no pretence: the mortgagor not having even communicated that he had any contemplation of improvement or better tenants. It would be most dangerous to entangle mortgagees in minute inquiries, whether some person would have given more; which was never communicated. Upon the same principle on which his Lordship determined the first exception in favor of the mortgagee, he must determine the other exception against him. The principle was the safety of mortgagees. The line could not be drawn. How could it be ascertained, that the mortgagor would want a slate quarry? The amount was in this instance inconsiderable, but the principle would reach the case of a mine. The mortgagee, therefore, having engaged in this speculation, must be held to speculate at his own hazard. The first exception was consequently over-ruled, and the second allowed. 12 Ves. 496.

Not allowed in account for speculation and adventure.

As for opening unproductive mine or quarry.

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Where a mortgagee is in possession without notice from the second mortgagee, he may pay the surplus rents over to the mortgagor; and the second mortgagee, if he is so imprudent as not to give that notice, cannot have an account of the by-gone rents; for he could not have such account against the mortgagor, and therefore, not against the first mortgagee. After notice given, the first mortgagee is answerable to the second; but the court cannot try upon affidavits whether the rents have been properly applied, or whether the estate has been properly managed. The course is, to decree a redemption, charging the first mortgagee with all that he has received [and applied to his own use], or with all that he might have received, had it not been for his own wilful default. *Berney v. Sewell*, 1 Jac. & Walk. 650.

Second mortgagee should give first mortgagee notice of his incumbrance to charge him with surplus rents.

It is also observable, that after a bill has been filed by a second incumbrancer against the first, the first incumbrancer in possession cannot safely pay the surplus rents to a general creditor who has filed a bill for the establishment of his lien. *Parker v. Calcraft*, 6 Madd. 11.

After notice given by subsequent mortgagees to the mortgagee in possession, it is quite clear that the latter has from that time no right to pay over the surplus proceeds to the mortgagor. He may be justified in doing so before he received such notice; and if he has actually paid any part of the surplus over to the mortgagor, he will be allowed it before the Master as matter of just allowance; or he may obtain leave from the court to set off any just demand, if he finds that he can avail himself of any such matter of discharge. *Archdeacon v. Bowes*, 13 Price, 368.

*Provided he
have notice of
their claims (H)*

But he will not be obliged to account for profits which he received, or might have received previous to the commencement and notice of such subsequent incumbrances; for until then his negligence doth no injury (*l*). Thus, where a mortgage was made of leasehold estates, and the mortgagee having possession by attornment of tenants, had permitted the mortgagor to receive the rents, and the plaintiff, who was the second mortgagee, was on his bill admitted to a redemption, on payment of what should appear due on the first mortgage; the question was, whether the mortgagee, having had possession, ought not to be charged with the rent, which he might have received but had neglected? *Et per curiam*, he ought to be charged with the rent, by whomsoever it had been received, after the second mortgage made; but what has been received before the second mortgage, he ought not to be charged with.

*Mortgagee not
allowed to use
his security to
prejudice other
creditors.*

And if a mortgagee permit the mortgagor to make use of his incumbrance to keep out other creditors, he will be charged with the profits from the time that they would have had a remedy, had it not been for his interposition; for equity will not suffer a man to make use of his securities to protect a debtor from the just demands of his creditors (*m*).

*Mortgagee re-
fusing to enter,
charged with
profits, when
(1).*

Thus, where one having made a mortgage of his estate, became a bankrupt, and the assignees of the statute brought an ejectment for the recovery of the lands comprized in the

(*l*) *Maddocks v. Wren*, 2 Ch. Rep. 3 Bac. Abr. 658, [S. C. cited ante, 109. vol. i. 292, *in notis.*—Ed.]

(*m*) *Chapman v. Tanner*, 1 Vern. 267.

(H) The case cited in support of this position does not appear to have turned on the point of notice. It proves merely that the mortgagee in possession will not be obliged to account according to the rigid rule of what he might have received in the interval between the time of his entry into possession, and the making of a second mortgage, but the rule in the text is uniformly acknowledged as good law. See *Parker v. Calcraft*, 6 Madd. 11; and *Archdeacon v. Bowes*, 13 Price, 368; cited in the preceding note; et ante, 948 *a*.

(I) See also another case, *infra*, p. 952, where he was charged with the profits for refusing or delaying to take possession after he had procured judgment in ejectment.

mortgage; the mortgagee having refused to enter, and suffered the bankrupt to take the profits, and to fence against the assignees with the mortgage, it was decreed, that he should be charged with the profits from the time of the ejectment delivered.

Nor shall a mortgagee, being in combination with the tenant in possession, who refuses to pay his rent, suffer the tenant to make use of his mortgage to cover himself from legal process taken out by the mortgagor, to evict him out of possession (K).

Combinations between tenant and mortgagee discouraged.

Thus, where G., who was a mortgagee under B., had brought an ejectment and recovered judgment against an estate, of which H. was in possession, by virtue of a lease for three years, but for which H. paid no rent, being insolvent (N); and G. being in combination with H. (who was accountable to B. for eighteen thousand pounds) refused to take out execution, and B. could not eject H. by reason of G.'s judgment; it was moved, that G. might be compelled to take

Court will order mortgagee having procured judgment in ejectment to take possession (L).

(N) *Duke of Buckingham v. Sir R. Gayer*, 1 Vern. 258.

(K) See, as to this, ante, vol. I. 173, note (B). The word "mortgagor," in the placitum to that note, should be "mortgagee," but the subject of the note will, it is conceived, apply to legal process by the mortgagor, as well as to legal process against the tenant by the mortgagee.

(L) In *Penrhyn v. Hughes*, 5 Ves. 106, the Master of the Rolls said, a mortgagee could not be compelled to take possession; for he would thereby subject himself to an account which a court of equity would never force upon him. He might file a bill for a foreclosure without taking possession. But if he did take possession, he would be bound to apply all the rents and profits as the court should distribute them among the several persons claiming interests subject to his mortgage. To this general rule, the case in the text must be read as an exception; but that case may support this doctrine, viz. that the court will not allow the mortgagee to vacillate between two opinions, so as to pursue the means of procuring possession to-day and discontinue them to-morrow; and, in fact, the court did not in the case of *Buckingham v. Gayer* force the mortgagee into possession; for by his own voluntary act he obtained a judgment in ejectment, which has all the effect of legal possession, he was then merely compelled to take actual possession or to account as having taken such possession, and *this*, very reasonably, to prevent an abeyance of the immediate occupancy.

Mortgagee not compellable to take possession.

out execution, and receive the profits in discharge of his debt. But it was objected on his part, that no order had ever been made to compel a mortgagee to take out execution, whether he would or not; for it might involve him in a suit, and would make him *volens volens*, bailiff to the mortgagor; whereas, a mortgagee, who acted discreetly, would not enter before he had foreclosed the equity of redemption. To which the counsel for the mortgagor replied, that they would not compel G. to enter; but, in case he did not choose to receive the profits, they desired the rent might be brought into court, which the court held to be reasonable; and it was ordered, that, unless G. took out execution before the end of the term, he should be answerable for the profits, as in case of wilful default.

[953]

Mortgages must be party to bill for redemption, though he has assigned.

It was held by the court to be the daily practice, that if a mortgagee assign over his mortgage, yet he must be made a party in a bill of redemption, that he may account for what profits he had received in his time (o) (M).

Account between mortgagor and first

Where there are several mortgages, an account stated between the first mortgagee and the mortgagor will bind the rest,

(o) *Anne*, in the Duchy, 2 Eq. Ca. Abr. 594, pl. 3. [S. L. *Pearson v. Pulley*, 1 Ch. Ca. 102.—Ed.]

Mortgagee having assigned, not a necessary party to a bill of redemption.

(M) Previously to the late case of *Chambers v. Goldwin*, so frequently referred to, this rule seems to have obtained, viz. that if the mortgagee assigned over without the assent of the mortgagor, the mortgagee would then have been a necessary party to a bill to redeem, to account for the profits received in his time; but if the mortgagee assigned with the mortgagor's consent, it would then have been unnecessary to bring him before the court. The case above alluded to, has over-ruled this distinction, as also the law in the text, without, however, any particular reference to the case in the Duchy, or the subject in general. Lord Eldon's sweeping observations were these:—"It is clear that the assignee of a mortgage, provided the transaction be not sanctioned by the mortgagor, will be liable to have the account taken from beginning to end. It has been pressed, that if there have been twenty mesne assignments all these parties must be brought before the court. That is not necessary: for, where there has been an assignment without the previous authority of the mortgagor, or his declaration that so much is due, it is enough to make that man a party, who has contracted to stand in the place of the original mortgagee and all assignees, till the title was got in by himself." *Chambers v. Goldwin*, 9 Ves. 169. The same law has been advanced, ante, vol. i. 405, in the text.

if there be no fraud or collusion (*p*). Thus, where the mortgagee sued the mortgagor to pay, or be foreclosed of redemption, an account was directed and settled before a Master; and then a subsequent mortgagee, whose mortgage was made before the former bill was exhibited, sued the first mortgagee and mortgagor to have a new account, supposing the former account to be false, and made by consent and fraud, but did not insist on any particulars, as in such case he ought to have done. The Lord Chancellor declared, that the account should bind the second mortgagee, without farther examination, if the fraud and collusion were answered; for the first mortgagee did all that he could, and was not bound to seek after the second mortgagee; for then it would be in the power of the mortgagor to make the assurance uncertain and endless to the mortgagee. It should suffice to deny the fraud and collusion.

mortgagor settled by Master, binding on subsequent mortgagee if no collusion.

But the account between the mortgagee and assignee will not conclude the mortgagor (*q*); but it will be referred to the Master to see what was really due on the making the assignment, and what money was *actually* paid thereon.

Account between mortgagee and assignee [954] signed not binding on mortgagor (N).

An account on a bill to redeem or foreclose (*r*), taken in a cause, in which tenant for life of the equity of redemption is

Account settled with privy of tenant for life,

(*p*) *Needler v. Deable*, 1 Ch. Ca. 299. 52, pl. 2.—*Ed.*]

Williams v. Day, 2 ib. 32. 2 Bac. (q) 1 Ch. Ca. 68, [S. L. ante, vol. i. p. 154, and infra, 966.—*Ed.*]

Sherman v. Cox, 3 Chan. Rep. 47, 8. 1 Eq. Ca. Abr. 12, pl. 7, (r) *Allen v. Papworth*, 1 Ves. 164.

[et vide *Crisp v. Heath*, 7 Vin. Abr.

(N) But the mortgagor may subsequently recognise the assignee, as also acquiesce in the account, which will prevent him from disputing it with the assignee; nevertheless, he may try the question of error with the original mortgagee, if the assignment has been made without his (the mortgagor's) assent; at least, so it may be inferred from Lord Eldon's observations in 9 Ves. 270, where there stated Lord Alvanley to agree with him in this, that if a mortgagor permits an assignee to pay the assignor a sum of money, which he, with the knowledge of the mortgagor, represents to be due, and more particularly if he permits it from day to day, and from year to year, he cannot quarrel with that representation, subsequently approved; which subsequent approbation has the same effect as if previous; but he is bound to institute his quarrel with the person who assigned, and with his privy received and retained the money a great many years before the bill filed.

Mortgagor may acquiesce in assignee's account, yet try questions of error with mortgagee.

binding on contingent remainder-man; but he may when in case surcharge and falsify (o).

party, and when no other person is entitled, will be binding on any contingent remainder-man, when his title afterwards vests; nor shall he open it, unless fraud or errors are shewn therein; for thereby the accounts upon mortgages, to which all

Old accounts not to be unravelled.

Strong ground necessary to set aside account.

(O) But he cannot, it is conceived, open or revive the equity of redemption if there be no fraud in the case, (*Lyne v. Willis*, infra, 1039); and it is observable, that in *Gray v. Minnethorpe*, Lord Rosslyn held, that an old account could not be unravelled, though settled on an erroneous principle. 3 Ves. 103. The true rule was perhaps advanced by Lord Alvanley, M. R. in *Chambers v. Goldwin*, 5 Ves. 837, that "a strong ground is necessary to set aside a settled account; and to surcharge and falsify, error must be charged by the bill." His Lordship in that case would not allow the account to be unravelled beyond fifteen years, that being a time when a new arrangement was entered into, and so much for principal and interest calculated up to that period. This decree was affirmed on appeal to the Lord Chancellor (Eldon) 9 Ves. 254; *S. C.* 1 Smith's Rep. 252, on which occasion the latter noble personage laid down these general principles:—

Account settled not to be set aside but for fraud, or surcharged and falsified, but for error.

The law, as well as the act of the parties, provides that accounts settled shall not be set aside for but fraud, or surcharged and falsified but for error. In support of the charges in the bill [in this case of *Chambers v. Goldwin*] that in settling the accounts, undue advantage was taken of the mortgagor's distressed situation, &c. there is no evidence of distress, unless the deeds themselves are to be considered so, which is going much farther than the court has ever gone, or is warranted in going. The charge of threats rests entirely in allegation not sustained by proof. As to the charge that the defendant [Goldwin, who was the assignee of the mortgage, one of the executors, of the mortgagor, and an attorney] caused the accounts to be transmitted and enrolled in Jamaica, in order to prevent their being opened, that, which is a circumstance to prove the absence of fraud, would thus be made a circumstance to prove the existence of it. It is clear, if error can be shewn, this court will correct an account, as far as it is erroneous; whether there is a stipulation for it or not. With reference to the material charge, that there are in the accounts, pretended to be settled, several manifest errors and overcharges, and particularly that 6 per cent. upon the gross profits and produce is charged for the management, though the defendant now resides, and for several years past has resided in England, and though the accounts contain various charges, as payment to attorneys, &c. the bill must either seek to set aside those accounts, as imputing the settlement of them to fraud; or, letting them stand, must seek to surcharge and falsify them; in which case, if they are to be considered settled and signed, the rule is fixed, upon the most obvious principle, that some error must be charged; as it is impossible for the defendant to defend himself if under a general charge, not specifying any error, the plaintiff may come at the hearing with proof of those errors, of which the defendant has heard nothing. The point was decided upon that ground by Lord Thurlow, upon my objection in *Taylor v. Haylin*, 2 Bro. C. C. 210; that if accounts are impeached on the ground of error, you must specify some or one error and prove that; and that is a ground to surcharge and falsify. I do not recollect a case

[955]

For the purpose of falsifying account, some specific error must be charged.

who can claim the equity of redemption are parties, would often be infinite. But if a reasonable objection be made against such account, the court will so far open it. But the court will only give leave to surcharge and falsify the account; which often happens upon settlements, where there is tenant for life with limitations in remainder, upon a bill for an account, when none but tenant for life is in being; a child afterwards coming *in esse*, shall, if no fraud, only have liberty to surcharge and falsify.

And where a man made a mortgage, and, after a forfeiture for non-payment of the mortgage money, married and conveyed the equity of redemption to trustees, to the use of himself for life, remainder to his wife for her jointure; and afterwards became a bankrupt (s); and the commissioners assigned the equity of redemption in trust for the creditors, and the assignees stated an account with the mortgagee: The jointress brought her bill to be relieved against this account, alleging, that it was not fairly stated, but that the assignees by combination with the mortgagee had allowed more money than was really due on the mortgage; the defendant pleaded this stated account. *Et per* Lord Keeper, the assignees stand in the place of the husband, and the account by them stated ought to be as conclusive as if it had been stated with the husband; and the bill is not right in charging a general fraud in the stating of this account, but the plaintiff ought to have assigned particular errors in the account.

Account between mortgagee and trustees of equity of redemption conclusive, if no fraud.

An assignee, after several assignments, will not be obliged to account for profits before his own time (t). Thus, where on a bill to redeem a mortgage made in 1632, it was insisted by

Assignee after several transfers not accountable for profits

(s) *Knight v. Bamfield*, 1 Vern. 179. (t) *Pearson v. Pulley*, 1 Ch. Ca. 102.

In which the Court has gone the length of declaring any thing error, unless the declaration has been confined to the subject of that, which is alleged to be error upon the pleadings. That would be attended with great inconvenience; for it is very possible, there might be cases in which the opinion of the court might be clear at the hearing that there was error; and yet, if it was distinctly put in issue, the court might be satisfied, that transactions had taken place, upon which it was impossible to consider it error, 9 Ves. 264.

before his own
time (v).

the defendant, that he came in as an assignee at the third hand, and therefore that it would be hard to put him to an account *then*; the Lord Keeper said, that as there had been no stint put to the time at which a mortgage was to be redeemed, the defendant should account; but, in regard he came in at an old hand, it should not be taken, but so far only as went in discount of his money, *not* for the surplusage. So, where lands were extended in 1625, and held in extent, and then a bill was exhibited to redeem, and the lands not being redeemed, that bill was dismissed in 1641 (u); afterwards, he who had the extent, by virtue of the dismission, sold the premises to the defendant, and the plaintiff having since bought the equity of redemption, came to redeem; the court, notwithstanding the dismission and length of time, ordered on account from the [time of the] purchase [only], not from any time before, but till then the profits [were directed] to go against the interest.

Mortgagee allowed in account all costs in supporting mortgage against attempts by mortgagor to overthrow it.

Where a mortgagor, having been defeated, after a special verdict and great agitation at law, in his endeavour to overthrow the mortgage by a supposed entail, exhibited a bill to redeem (x); the mortgagee having sworn, that he paid 120%. in defending his mortgage at law, although he had but 60%. costs allowed him there; the court determined that he should not be held down to the taxation at law, but should, upon the account, be allowed all that he had laid out or expended; and the mortgagee, fearing his mortgage would have been defeated at law, having got administration, as principal creditor, in the Spiritual Court, he was allowed the costs expended *there* also (q).

(u) *Cloberry v. Lymonds*, 2 Ch. Rep. 392. [See the same case and point, ante, vol. i. 336, in the text.—Ed.]

(x) *Ramsden v. Langley*, 2 Vern. 536.

(P) See *quare* now, and see ante, p. 953, note (M).

Mortgagee allowed in account expences, repairs, fines, and improvements, but he should first inform mortgagor of their necessity.

(Q) It may be proper in this place to add, that the mortgagee in accounting will be allowed all costs of suit, taxes, renewal fines, sums expended for necessary repairs and lasting improvements, or in performing the covenants of the mortgagor with third persons, as in carrying into effect a covenant to build; so he will be allowed all money expended in defence of the mortgagor's title, and all sums paid for copyhold admissions, heriots, or fines, with interest for the same respectively, after the rate of the principal, provided the court

An account taken by a Master upon a decree in a bill of *Account binding on infant, when.*

doth not direct otherwise. *Degelder v. Depeister*, Finch, 207. *Elton v. Elton*, 3 Atk. 508. *Godfrey v. Watson*, ib. 518. *Lomax v. Hide*, 2 Vern. 185. *Manlove v. Ball*, 2 Vern. 84. 2 Bro. C. C. 653. *Lacon v. Martins*, 3 Atk. 4. *Woolley v. Drage*, 2 Anstr. 551. *Lyster v. Dolland*, 1 Ves. jun. 436. *Hardy v. Reeves*, 4 ib. 482. *Quarrell v. Beckford*, 1 Madd. Rep. 281. *Sykes, Ex parte*, 1 Buck B. C. 349. *Brightwen, Ex parte*, 1 Swan. 3. et vide ante, 920, 21; and infra, 991, et seq. where a mortgagee thinking himself absolutely entitled, had expended considerable sums in repairs and lasting improvements, he was allowed such expenditure, but he was directed to account for wilful spoils and wastes. *Thorne v. Newman*, Finch, 38; and as a general rule it may be laid down, that where a mortgagee in possession, finds it absolutely necessary for the protection of the estate to incur extraordinary expences, he will be allowed them; particularly if in accounts regularly furnished by him for the satisfaction of the mortgagor, the latter doth not from time to time object to the extraordinary charges; for they are then to be considered as incurred and paid with the mortgagor's approbation; but without the mortgagor's acquiescence, Lord Mansfield, in a recent case said, he should have felt considerable difficulty in allowing charges for preservation of the property; for that even in the case of absolute necessity, it was incumbent on the mortgagee to apprise the mortgagor, as soon as possible, of the extraordinary expenditure. *Trimleston v. Hamill*, 1 Ball & Bea. 385. It should be added that a mortgagee will not be bound to keep up buildings in as good repair as he found them, if the length of time will account for their being dilapidated; *Russell v. Smithers*, 1 Anstr. 96. and a mortgagee in possession of mines is not bound to spend more in working them than a prudent owner would do. *Rosse v. Wood*, 2 Jac. & Walk. 553.

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In estimating lasting improvements, old buildings pulled down, if incapable of repair, are to be valued as old materials only. *Robinson v. Ridley*, 6 Madd. 2. Lands were limited by marriage settlement upon failure of issue male, to daughters and their heirs, until the next remainder-man should pay them 3000*l.*; there being no sons and four daughters, they entered. The Master of the Rolls decreed that they should account for the profits, and that the rents should be applied, first to pay the interest, and then to sink the principal, as in the case of a common mortgage, which decree was affirmed by the Lord Chancellor, with this variation, that the principal should not be sunk till a third part was raised above the interest, and so again, when another third part was raised. *Blagrove v. Cusn*, 2 Vern. 523. 576.

It seems that money laid out by a mortgagee in repairs and beneficial improvements, form a lien on the land, ante, 671; but in ordinary cases, money laid out in improving premises does not create a lien, yet if a party conceiving himself to be owner makes lasting improvements, a court of equity, it is assumed, would not take the estate from him without compelling the plaintiff to make some allowance for the sum expended in improving his premises. *Swan v. Swan*, 8 Price, 518.

In ascertaining what was due on the mortgage of a house and the appurtenances to a mortgagee who had taken possession, the Master had allowed *Mortgagee allowed expense*

of buildings substituted for decayed old buildings, even though the new erections should be on an improved scale.

him the costs of some improvements which he had made. The building being in a very dilapidated condition, he had rebuilt the kitchen, pantry, &c.; and he had the house double-roofed, instead of being as it was before, only single-roofed. The mortgagee had been charged with an occupation rent; and that rent had been estimated with reference to the increased value of the premises caused by the new erections.

The mortgagor excepted to the report, on the ground that he ought not to be charged with the sums expended on the premises by the mortgagee. For the exception it was contended, that a mortgagee had no right to increase the amount of the charge on the property by expending money upon it without the sanction of the mortgagor. If the property began to fall into a state of dilapidation which was likely to diminish its value so much that it would not be an adequate security for his money, his remedy was by foreclosure, and not by laying out money in what the mortgagee might conceive to be repairs or improvements but which the mortgagor might not choose to have made. For the report it was urged, that the improvements appeared by the finding of the Master to have been substantial and proper, and a mortgagee was justified in acting as a provident owner would have done. Nothing would be more injurious to mortgagors, than that a mortgagee should be unable, with safety to himself, to expend money in maintaining the premises in good repair. The Vice-Chancellor:—This mortgagee has not made new buildings for new purposes; he has only erected new buildings on the site of the old, and for the same purposes as were served by them. The new buildings are merely substitutions for those which were too ruinous to be any longer useful. This exception must be over-ruled. *Marshall v. Cave*, MSS. Mich. 1824. Chanc.

Occupation Rent.

The Master had charged the mortgagee with an occupation rent, not from the time when he recovered possession of the premises, but only from the time when the repairs had been completed.

An exception was taken to the report, on the ground that the occupation rent ought to have been calculated from the date when the mortgagee entered into possession. The mortgagor, it was said, was here charged with interest during a time when the mortgagee was in possession of the property, and yet was charged with no rent. Was the mortgagee to be allowed, first to occupy the premises *gratis*, and then to charge interest? On the other hand, it was answered, that the finding of the Master shewed, that, at the time when the mortgagee recovered possession, the premises were in so ruinous a state, that no rent could have been gotten for them; and a mortgagee could not be charged with rent for that which appeared to be, in truth, of no annual value. The Vice-Chancellor was of this opinion, and over-ruled the exception. *S. C.*

Repair allowed by Roman law, whether pledge in existence or not.

By the Roman law, if a mortgagee had been at any necessary charges for the preservation of the pledge, whether he was in possession of it or not, the debtor was bound to reimburse him, although the thing were no longer in being; as if a house repaired by the mortgagee had been carried away by a flood, or burnt down, without his fault; and if the pledge were still existing, and in the custody of the mortgagee, he was allowed to detain it for expenses of this kind; for they were considered as augmenting the debt, and as forming a part of it. Cod. lib. 6. dig. lib. 8. *Si necessarias impensas*, &c. et vide Vin. lib. 32. de rei vind.

revivor, brought by an infant heir, will bind the heir, unless he can surcharge or falsify (y) (R).

Where the yearly rents and profits of an estate in mortgage greatly exceed the interest of the money lent, rests are annually made on making up the account, and the surplus applied to sink the principal (z) (s). But as this is often attended with great hardships to mortgagees (especially when the sum is large, and the mortgagee forced to enter upon the estate, and then can only satisfy his debt by parcels, and is a bailiff to the mortgagor, without salary, subject to an account) the Master is not obliged, on every small excess of interest, to apply it to sink the principal; nor has the court ever laid it down as an invariable rule, that the Master must always, in taking such account, make annual rests (T).

Annual rests in account; and balances, if excessive, applied to sink principal.

(y) *Badham v. Odell*, 4 Bro. P. C. (z) *Gould v. Tancred*, 2 Atk. 534, 447. S. C. ante, 914, note (x); et vide [et vide *S. L. Bradshaw v. Ashley*, 4 Bro. P. C. 505, Tomlins' edit.—Ed.]

(R) It is incumbent, therefore, both on the mortgagor and mortgagee to object to the defects in an account before a Master, that it may be made perfect before him; for the court will not afterwards intermeddle therewith. See Harrison's Ch. Pr. 480.

(S) The object of directing annual rests is to give compound interest. *Raphael v. Boehm*, 11 Ves. 92; and in *Quarrell v. Beckford*, 1 Madd. Rep. 283, it was said by Sir Thomas Plumer, V. C. that if compound interest be given on one side it ought to be allowed on the other, for the benefit should be equal, and as the defendant in the case in question would not agree to give compound interest, neither party could expect more than simple interest.

Object of annual rests to give compound interest.

(T) On a decree against a mortgagee in possession to account, rests cannot be made by a Master unless directed by the decree. In *Yates v. Hamblly*, 2d May, 1815, the decree appears from the register book to have been, "that an account be taken of what shall be coming due on account of rents and profits, to be applied, in the first place, in payment of interest and principal, and in sinking the principal, and the Master to make annual rests, and in taking such account is to make all just allowances." This was said to be the proper form of a decree where rests are to be made, 1 Madd. Rep. 14. In another case, a bill was filed to redeem a mortgage, and the usual decree was made against the mortgagee, who was in possession, viz. that an account be taken of what was due for principal, interest, and costs, and of what had been, or might have been received by rents and profits; a motion was made, that under this decree the Master should be directed to make rests; Sir T. Plumer, V. C., said, he had upon inquiry, found a difference of practice amongst Masters, some made rests without any specific direction in the decree for that purpose, and

Annual rests cannot be made, unless ordered by decree.

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Mortgagee answerable for what he receives after decree for account.

It is the constant practice of the Court of Chancery, in decrees against a mortgagee upon a bill for redemption, or against an executor to account, to direct it with future words, to wit, to account for what they have received, or might have, if it

Annual rests directed only on special case, and then for whole time.

some did not, but merely totalized the principal, interest, and costs, and the rents and profits. His Honor added, that the Master was not at liberty to make rests, unless directed to do so by the decree. *Webber v. Hunt*, 1 Madd. Rep. 111. *Roe v. Dobson*, MS. April 1823. 4 Madd. 254.

It is not usual for a mortgagee in possession to render annual accounts. The mortgagor lies by, and when he conceives the debt is satisfied, he calls on the mortgagee for a final adjustment, per Lord Manners, Ch. in *Trimleston v. Hamill*, 1 Ball & Bea. 383. The consequence is, that decrees of account do not in general direct annual rests, but simple interest is calculated, against which, and the principal and costs, the total amount of so many years rent is set; but whenever annual rests are directed, they must be calculated from the time the mortgagee entered into possession, and not from any subsequent period. Thus in *Davis v. Mey*, Coop. Rep. 238, it was insisted on the part of the plaintiffs, that the excess of rent beyond the interest ought to be applied annually in sinking the principal, and for that purpose, the decree ought to direct that the accounts from 1809 to 1815, be taken with annual rests. Sir S. Romilly, for the defendants, contended that the accounts ought not to be taken in that manner, but that the proper mode was to calculate interest on the original debt from the date of the mortgage, and ascertain the amount of all rents received, and then deduct the total rents from the amount of the principal mortgage money and the interest so to be calculated on it; that an application having been made to the Register, he had searched his books for three or four years past, and had found ten cases of decrees for taking the accounts of mortgagees in possession, only two of which, (*Forside v. Boyers*, and *Kingston v. Roper*, which had been cited on the other side,) had directed annual rests to be made, whereas the decrees in the other eight cases did not contain any such direction, from which it seemed clear that it was not the usual course of the court to direct annual rests unless the case was extraordinary, and where the mortgagor would be materially injured without it; and the Register, upon being consulted, had also stated, that it was not usual to direct annual rests, except under special circumstances. Sir W. Grant, M. R., said, he thought his recollection of the form of decrees was the same. The direction to take accounts with rests was not of course. There was no instance of a decree in the form prayed, with rests from a particular period of the account, when the arrear of interest was discharged. There were only two forms of decrees, either with or without rests. Here the special circumstances were against such a direction, which it was admitted, would be improper from the beginning of the account while there was an arrear of interest. The account was accordingly directed without rests. *Stokes v. Robson*, 19 Ves. 383.

Mode of calculating account.

In *Raphael v. Boehm*, 11 Ves. 92, the decree directed a computation of interest at 5 per cent. on all sums received by the executor while in his hands, and that "the Master do, in such computation, make half-yearly rests." This decree,

Rests sometimes dispensed with, when interest has been in arrear.

had not been for their own default (a): and yet if the person, decreed to account, receive any thing subsequent to the decree, it is inquirable before the Master, and the defendants in such case must bring such sums so received to account (v).

(a) *Bulstrode v. Bradley*, 3 Atk. 582. [See also ante, 949 b, n. (k).—Ed.]

though perhaps going farther than usual, was held, under the circumstances, properly executed by a computation of interest upon each receipt from the day it was received: the balance of receipts, with the interest so calculated, and payments being struck at the end of the half year, and that balance, so composed of principal and interest, being carried forward as an item in the accounts, producing interest.—As to the circumstances which call for a direction of annual rests; the general principle is, that a specific case must be made out shewing that the mortgagor would be materially injured by not being allowed interest on the annual balances in the hands of the mortgagee. In *Sheppard v. Elliot*, 4 Madd. Rep. 254, the interest had never been in arrear, and the rents exceed the amount of the interest payable on the mortgage. Sir J. Leach, V. C., said, the account in this case was to be directed with rests, in order that the excess of rent beyond the interest might be applied in sinking the principal. But his Honor added, that the court sometimes relaxed this rule, where the interest was in arrear when the mortgagee took possession. As to the appropriation of general payments, see ante, 944; on payment of part of the principal, there a rest must necessarily be made, otherwise the mortgagees would be receiving usurious interest.

A mortgagee in possession, holding over after payment of his principal and interest, will be charged with interest on the balance in his hands. *Quarrell v. Beckford*, 1 Madd. Rep. 269. So in *Trimleston v. Hamill*, ubi supra, a mortgagee in possession was charged with interest on gales of rent received by him after the debt was satisfied. 1 Ball & Bea. 377.

Mortgagee charged with interest on surplus rents.

So, where a mortgagee in possession had been over-paid by the rents and profits which he had received, the court decreed him to pay interest for the annual balances in his hands. *Sherlock v. Lowe*, Irish T. R. 604, cited; et vide *Tebbs v. Carpenter*, 1 Madd. Rep. 290. In a late case, a mortgagee was admitted into possession to pay himself out of the rents of the estate. Upon taking the account it appeared, that he had been over-paid some time. *Prima facie*, no man has a right, said the court, to keep in his hands, for any length of time, the money of another, without allowing the person from whom he has withheld it, interest for the time during which he has retained it. The Chief Baron was therefore of opinion, that the mortgagee's executor ought to pay interest on the balance in the testator's hands, and then in his, and also on the balance due from himself, from the time when the mortgagee received the notice to the present,—not compound interest, but simple interest on the gross sums in their hands, from the end of each year for which the rents were received by them. *Archdeacon v. Bowes*, 13 Price, 369. S. C. ante, 948.

(U) In decrees of account it is also sometimes directed, where there has been usury, extortion, or oppression, that every thing doubtful shall be taken

most strongly against the person guilty of such iniquitous proceedings; see *Mitford v. Featherstonehaugh*, 2 Ves. 445.

The anomalous cases referrible to the subject of this chapter are the following:—

Second account. 1st. In directing a second account on the same mortgage, the court will order it to be taken from the foot of the preceding account, (*Proctor v. Cowper*, 2 Vern. 377) or from the date of the confirmation of the report, as the case may happen. *Badham v. Odell*, 4 Bro. P. C. 454, 8vo. edit.

Purchaser to account as mortgagee, when. 2d. If a mortgagee purchase the equity of redemption for a trifling consideration, which purchase is afterwards set aside as fraudulent, he will have to account as mortgagee. *Morley v. Elways*, 1 Ch. Ca. 107. *S. C.* ante, vol. i. 510, 511. So persons purchasing from expectant heirs will, if the price be grossly inadequate, be decreed to account as mortgagees. *Shelley v. Nash*, 3 Madd. 236. *Bowes v. Heaps*, 3 Ves. & Bea. 117.

Specific legatee of mortgage debt should be party to account. 3d. A specific legatee of a mortgagee, or rather of the money due on a mortgage, will not be bound by an account settled between the representatives of the mortgagor and those of the mortgagee, for the bequest being notice, the legatee should have been a party to the account. If the mortgage had been devised in general terms to pay debts and legacies, such account with the executor would have been a discharge; but it is otherwise in the case of a specific legacy. *Langley v. Oxford*, Amb. 17.

Account settled between assignee of mortgage and executor of mortgagor liable to be re-opened, and not merely surcharged and falsified. 4th. A mortgagee who has been appointed an executor to the mortgagor renouncing the executorship, and then settling his accounts with the other executors, will be subject at any time to have those accounts opened by the parties entitled to the equity of redemption. Lord Eldon's concluding remarks, in *Chambers v. Goldwin*, (9 Ves. 274) supports this position. His Lordship there said, that as to the accounts settled since the decease of the mortgagor between his executors and the assignee of the mortgage, (such assignee being also an executor of the mortgagor, and having renounced), a court of equity could not on principle, considering what was required from persons standing in the situation of the assignees, hold those accounts, so settled with the executors, not to be opened to full investigation in the Master's office; Lord Eldon should therefore vary the decree, as to the former particulars; and confirm it as to the executor's accounts. But as to the accounts settled with the mortgagor, they must be considered as settled, not to be opened, but to be surcharged and falsified.

Deeds stolen. 5th. In a case where the title-deeds had been stolen from a mortgagee, the account directed was with an inquiry what had become of them. *Stokoe v. Robson*, 3 Ves. & Bea. 51. *S. C.* 19 Ves. 385; et infra, 993, 4. s. 11. In another case, upon a bill of foreclosure, the mortgagee having been robbed of the title-deeds, payment of the mortgage-money within a limited time was decreed, and on payment of the same a re-conveyance was directed, with a bond of indemnity. This order was made by arrangement of the parties, but with some reluctance on the part of the Vice-Chancellor, who doubted whether it would not have been the best course to have made the usual decree for redemption and re-conveyance, leaving it to the mortgagor to bring an action of trover for his title-deeds. *Shelmardine v. Harrop*, 6 Madd. 39.

6th. A mortgagee may take advantage of a recital in the deed of assignment, to shew what the mortgagee and assignee considered due, which will be binding on the parties to the deed, according to Lord Redesdale's doctrine

in *Carew v. Johnstone*, 2 Sch. & Lef. 295. So a statement of property written by a testator, (who is either a mortgagor or mortgagee) as also his books of account, will be evidence to shew what is really due. *Druce v. Dennison*, 6 Ves. 885.

7th. After an account taken under a decree in a court of equity, a party will not be allowed to overhaul the account, by bringing an action at law on the same subject-matter. Thus, where a bill had been brought in the Irish Court of Chancery, by Martin and Bell against O'Reilly, and a decree to account had been made, under which the Master took the account, but the defendant conceiving the same to be erroneous, abandoned it; and brought his action in the Exchequer on the same subject-matter; Lord Redesdale, C., said, there would be an end to the jurisdiction of the Court of Chancery in matters of account, if this practice were to be allowed, every account settled by the officer would become the subject of an action. If Bell had promised to pay the sum reported due, and the action had been brought on special assumpsit, Lord Redesdale would not have objected, but this was in effect an action to try whether the account was rightly taken. Both parties had been wrong. Instead of filing this bill, Bell ought to have declined appearing to the action, and to have applied for an attachment against O'Reilly for proceeding at law. Having suffered the action to proceed, Bell should pay the costs of it. But his Lordship would grant an injunction against proceeding at law; and restrain the plaintiff from advancing further in equity; nevertheless, both parties were at liberty to proceed in the first cause as they might be advised, and the account, if erroneous, Lord Redesdale added, should be rectified. *Bell v. O'Reilly*, 2 Sch. & Lef. 430.

Account taken in equity cannot be overhauled at law.

Lastly, it is observable, that in cases of bankruptcy, where it is merely a *Bankruptcy* question of convenience, it will be left to the assignees to choose whether mortgage accounts shall be taken before the Commissioners or a Master. *Ainsley, Ex parte*, 1 Buck's Bank. Ca. 297.

CHAP. XXI.

OF FORECLOSURE (A).

Mortgages may foreclose, if estate be in possession, or pray sale, if it be in reversion.

THE same principle of substantial justice, which induced courts of equity to interfere on behalf of a mortgagor, who had forfeited his estate (by not performing the condition annexed

Introductory observations.

(A) We are now arrived at the last stage of our long journey through the widely-extended field of mortgage transactions—the mode whereby the mortgagee may acquire the estate to himself absolutely, and by which he may make all relations between him and the mortgagor to cease. To foreclose the equity of redemption, a bill in Chancery is exhibited; to which an answer is put in, and a decree being obtained, a Master is directed to certify what is due for principal, interest, and costs, which is to be paid at a time prefixed by the decree, or at a time to be settled by the Master, whereupon the premises are to be re-conveyed to the mortgagor; or, in default of payment, the mortgagor is ordered to stand for ever foreclosed from all equity of redemption, and to convey the premises absolutely to the mortgagee if that has not already been effectually done. Something similar to our modern doctrine of foreclosure appears to have prevailed in the Roman Law, where it is said, “*si eo tempore quo pradium distrahebatur, programmata admoniti creditores, cum praesentes essent, jus suum executi non sunt, possunt videri obligationem pignoris amissas.*” Cod. de remiss. pign. lib. vi. And by Halifax’s Anal. of the Civil Law, it appears, that in case the mortgage money was not paid at the stipulated time, the creditor was empowered to sell the pledge, allowing the debtor two years after notice given to redeem it. Inst. xi. tit. 8. s. 1.

Foreclosure, tedious process, compared with advantages under trust for sale.

The recent practice of introducing trusts for sale in mortgages of small amount, or in cases where the circumstances appear hazardous, have tended very sensibly to lessen the use of foreclosures; and the tedious and often expensive difficulties attendant on that process, will operate still more to abridge, if not in the end entirely to subvert, the method of concluding the equity of redemption by foreclosure. While, on the other hand, the easy and expeditious mode of obtaining payment of the money lent, comparatively without expence or difficulty, by means of an immediate and peremptory sale, as also the very equitable plan of returning the surplus produced by the sale, after deducting the principal, interest, and costs to the mortgagor, will facilitate the adoption of mortgages with powers of sale, and ultimately, perhaps, establish them as the only and proper mode of mortgaging in general use. A foreclosure may also be obtained on this species of mortgage, but it has been decided, that if a mortgagee with a power of sale files a bill to foreclose, he will not on motion be directed to sell. Assen. MS. 1 Madd. Ch. 532. For

to the conveyance thereof), and to relieve him from the consequences that in law followed such neglect, rendered necessary the establishment of rules, by complying with which the mortgagee might compel the mortgagor to perform the contract on his part; namely, the re-payment of the money borrowed, with interest. This may be done, either by procuring a decree for sale of the estate, if reversionary, or, if in possession, by calling upon the mortgagor in court to redeem his estate presently, or, in default of so doing, to be for ever foreclosed, that is, barred and utterly excluded his equity of redemption without recal, unless upon *special* circumstances (a).

Where the mortgage is of money in the stocks, or the like, *Stock mortgaged, may be sold without foreclosure (B).* no decree of foreclosure is necessary (b); therefore, where a

(a) 2 Inst. 198. [As to reversions, see *infra*, 1014.—Ed.]

(b) *Lockwood v. Ever*, 2 Atk. 303.

further on mortgages of this latter description, see *ante*, vol. i. p. 12, n. (K). A form on this subject will be added in the Third Volume.

The present chapter cannot well be reduced to any regular distribution. *Contents of chapter.* The interpolations of the learned author in the fourth edition, may be assigned as the probable cause of this disarrangement. The chapter treats, 1st. Of the general principles of foreclosure; 2d. Of foreclosing a mortgage of stock, see next page; 3d. Of the necessary parties to a bill of foreclosure, in p. 963, 4, 5, 8. 975, 978; 4th. Of the time and effect of a foreclosure, p. 968; 5th. Of the mortgagor's power to sue on all his remedies at the same time, p. 966; 6th. Of foreclosure against volunteers, and on a mortgage of copyholds, p. 967; 7th. Of the dismissal of a bill for redemption, p. 967, 8; 8th. Of imperfect foreclosures, p. 970; 9th. Of foreclosing particular tenants (p. 972), and those in remainder, p. 974; 10th. Of the effect of foreclosure on incumbancers who are not parties to the bill, p. 975. 988; 11th. Of foreclosing infants, (p. 980), and feme coverts, p. 983, 6; 12. Of the payment of costs of foreclosure, p. 991 and 1021; 13th. Of the effect of fraud in obtaining a decree of foreclosure, p. 996 and 1007; 14th. Of enlarging the time to redeem on a decree nisi, p. 997; 15th. Of opening a decree of foreclosure, p. 998 to 1013; 16th. Of foreclosing a Welch mortgage, p. 898; 17th. Of suing on collateral securities after foreclosure, p. 1000 and 1002; 18th. Of foreclosing a mortgage as to part of the estate, p. 1013; 19th. Of praying a sale instead of a foreclosure, p. 1014 to 1016; 20th. Of distinctions between foreclosure and redemption, in reference to the doctrine of tacking, p. 1016 to 1019; and 21st. Of restraining bonds within the penalty, p. 1019 to 1021. [962 *]

(B) The mortgagee may, at any time after the condition broken, sell the stock and repay himself the money, without being accountable for any de- *Exchequer annuities mortgaged as well*

bill was brought in 1729 by the plaintiff, to redeem the sum of 2500*l.* East India stock, transferred to the defendant in 1708,

as other species of stock may be sold on notice, without foreclosure.

preciation of the funds ; nevertheless returning, as it is presumed, the surplus, if any, after payment of his debt and costs to the mortgagor. In the case of *Tucker v. Wilson*, 1 P. Wms. 261, a person possessed of an exchequer annuity for ninety-nine years, borrowed money upon it, and, for securing this money, there was an absolute transfer of the annuity, but with a defeasance, that if the money were paid at such a day, the assignment should be void. The money was not paid at the day ; upon which the lender, after several applications for re-payment, gave notice that he would sell, appointing a time for that purpose, and desiring the borrower to be present to see that the annuity was sold at the full value. The borrower, by letter, requested the lender to stay a week longer before he sold, which was complied with ; and in the interval the lender died suddenly, whereupon the defendant, his administrator, sold the annuity at the exchange, by a sworn broker, for the full value those annuities then sold for, and which was less than the amount of the money due to the defendant. These annuities afterwards rose in value ; upon which the mortgagor brought a bill to redeem, and it was so decreed by Lord Harcourt, who ordered the defendant to procure an annuity of the like value and upon the same fund, to be conveyed to the plaintiff upon his paying to the defendant the principal and interest of the money advanced. And his Lordship appears to have made a similar decree in *Manning v. Scott*, cited in the margin of 15 Vin. Abr. 476, pl. 7. But in the case of *Tucker v. Wilson*, an appeal was lodged in the House of Lords, where it was insisted on the part of the mortgagee, that these exchequer annuities, as well as stocks, were usually sold at the exchange, and that this was but a pawn ; and though there was no express power to sell in the defeasance, yet by the mortgagor's letter it was plainly submitted to, when the mortgagor desired the sale might be deferred for a week ; that the convenience of these securities, among merchants, was, that after the day of payment past, they were taken to be ready money ; and that it would be infinitely troublesome and dilatory, if there could be no sale of such annuities thus pledged, without a decree of foreclosure ; that this would set aside several sales that had been made in like cases, and occasion multiplicity of suits ; that the case here was stronger than usual, it being that of an administrator, who was obliged to dispose of the assets of the intestate to pay his debts and legacies. Wherefore Lord Harcourt's decree in the last-mentioned case was reversed by the Lords, *nemine contradicente*. 1 P. Wms. 262, et vide infra, end of the next chapter.

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Foreclosure in Ireland is by means of a decree for sale.

It may be proper to mention here that foreclosures in Ireland are effected by means of a decree for sale. The equity of redemption stands for ever foreclosed, but the estate is directed to be sold, and the mortgagee paid his principal, interest, and costs, and the surplus returned to the mortgagor, his executors or administrators, vide infra, 999, n. 1004, 1116. The following is a decree for this purpose pronounced in the Irish Court of Exchequer :—

“ Their Lordships doth order and decree that an account should be taken of the sums due on the foot of the said mortgage and judgment, and that the same, with interest, should be paid within six months from the time of con-

for securing the sum of 2000*l.* and interest; the defendant having executed a defeasance, whereby he obliged himself to

firming the report to be made by the chief remembrancer of the said court in pursuance of the said decree, and that in default thereof the equity of redemption of the said mortgaged premises should be foreclosed, and the said estates sold, and that out of the money arising from the sale the chief remembrancer or his deputy should pay to the said William Curtis (the mortgagee) the sums which should be reported due to him, with interest and costs; that the remainder should be paid to said defendant (the mortgagor), and that all proper parties should join in the deeds of conveyance to the purchaser." 1 Dow. P. C. 20, 1.

Where a bill to foreclose had been filed in Ireland and the court made a decree, and ordered the mortgaged lands to be sold according to the usual course, and afterwards a third person who had paid off the mortgage and taken an assignment thereof and of the decree of foreclosure, applied to the court to set aside their order for a sale, the Irish court of Chancery refused the motion, whereupon the assignee appeal to the Lords, by whom the order of refusal was affirmed, with costs. *Crowe v. Halliday*, 2 Ridgw. P. C. 50.

But though a sale will be decreed on any bill filed by the mortgagee, yet it is observable that a bill filed by a mortgagor or his representative against the mortgagee, praying a sale, may be demurred to if the bill does not proffer a redemption. A testator who had previously made a mortgage to the defendant, devised the estate in trust to be sold for payment of debts, &c. The trustee wishing for a sale, but not being willing, perhaps unable, to advance the money for redemption, filed a bill against the mortgagee, praying that he might be directed to lend his assistance to carry the trusts of the will into effect. The mortgagee demurred, for that the plaintiff did not by his bill offer to redeem him. Sir W. M'Mahon, M. R. :—No decided case has been referred to in support of this bill against the mortgagee. It is true that many such bills have been filed, and have passed *sub silentio*; and it requires no research nor ingenuity to discover the reasons which have obviously led to it. As the rights of a mortgagee, where the mode of relief is a sale, are manifestly, in general cases, coincident with the remedies of the general creditors of the mortgagor, or a trust for that purpose, it cannot excite surprise that the mortgagee, in most cases, concurs in the relief of a general administration of the assets, in which his rights always are preferred and guarded according to their peculiar nature, and that he does not insist upon an offer of redemption. But the question here is, whether if the mortgagee refuse so to concur, and insist upon redemption, the nature of his estate, and his rights as acknowledged in a court of equity, do not authorize him so to do. I think he has that right, and that, therefore, the demurrer must be allowed. It must be admitted, that a subsequent mortgagee or judgment creditor, filing a bill against a prior mortgagee, is only entitled to a redemption decree. The same I hold to be settled as to a jointress of even part of the mortgaged premises, and as to a devisee, or any other person having such a beneficial interest in the equity of redemption as gives them a right to redeem. But it is argued that the different practice in mortgage cases in this country, by a sale, makes an essential dif-

Bill against mortgagee cannot pray a sale but must offer to redeem.

transfer the stock on payment of the 2000*l.* and interest, on the 2d of July following the mortgage of it. The Lord Chancellor said, this was a very plain case for the defendant. In a mortgage of land, a bill of foreclosure ought to be brought, but on a mortgage of stock it was not necessary, and therefore a strong reason for the mortgagor's departing from the right.

Though it increased in value.

And the stock having increased in value, which is a mere accident, will be no inducement to a court of equity to decree a redemption (c).

But, it is to be observed on the last-mentioned case, that the period of time had elapsed between the mortgage and the bill to redeem, after which, it will be shewn hereafter, a court of equity refuses its aid to a mortgagor, unless under special circumstances.

Mortgagor or his heir necessary party to bill of foreclosure. So are three mortgagees having lent equal sums, on one security.

The mortgagor or his heir are necessary parties to a bill to foreclose by the mortgagee (d).

If there be several mortgagees of an entire thing mortgaged, they must all be made parties to the bill of foreclosure. This was held to be necessary in the case of *Lowe v. Morgan* (e),

(c) *Lockwood v. Ewer*, 2 Atk. 303. at large, *infra*, pages 967, 968. 973,

(d) *Howes v. Wadham*, Ridgw. Rep. and 974.—Ed.]

199. [This subject is discussed more (e) 1 Bro. C. C. 368.

ference in the form of the bill, and that the plaintiff being a trustee, obviates the objection taken by the demurrer. It is true, the different practice of selling the mortgaged premises in this country, tends to important differences in a foreclosure cause; for as a sale is directed, an account of prior incumbrances becomes essential; and thereby, as I conceive, an account of the personal fortune of the mortgagor is indispensable when the mortgagor is dead. Whereas in a mere foreclosure decree, such account is not necessary. His Honor allowed the demurrer, with costs. *McDonough v. Shackbridge*, 2 Ball & Bea. 585. Similar equity seems to have been dispensed in *Drew v. O'Hara*, where Lord Chancellor Manners was of opinion, that a person deriving title from a mortgagor after he had executed the mortgage, could not file any bill against the mortgagee, except to redeem him; and that the first mortgagees having the estate absolute at law, could not be brought into a court of equity by the mortgagor, or those deriving under him, unless they offered to redeem him. *Ib.* 562.

No bill can be filed against mortgagee, except to redeem him.

where a share of Covent-Garden Theatre having been mortgaged, the mortgagee assigned the mortgage to a trustee, in trust for three persons, who contributed equal proportions of the money. One of the three filed a bill to foreclose the equity of redemption. The cause was opened as a common bill of foreclosure, and the ordinary decree pronounced; but the Register finding some difficulty in drawing up the decree, applied to the Lord Chancellor, who said it was a new case in respect to their being joint-tenants, and that it would be impossible for one to foreclose, without making the other two parties. The cause therefore stood over for that purpose.

But where a trustee laid out the money of different persons on a mortgage, a foreclosure was permitted by one *cestui que trust*, as to his share on a bill filed by him against the mortgagors and co-mortgagees [the trustee having refused to assist the plaintiff in recovering his money, and being made a defendant in the cause (f) (c).] [964]
But one may foreclose as to his share by bill against mortgagor and co-mortgagees.

(f) *Montgomery v. Marquis of Bath*, 970, 1, and 975, 6, 7, 8, in notice.—3 Ves. 560. [As to the necessity of Ed.] making trustees parties, see *infra*,

(C) The only ground on which this and the preceding case can be reconciled is, that in the former the *cestuis que trust* were joint-tenants of the money laid out in the name of their trustees, whereas in the latter they were tenants in severalty, or rather perhaps tenants in common. And there certainly does appear to be a material difference between the instances, where a sum of money is given to A. in trust for three persons, as joint-tenants, with power to invest the same on mortgage, and the trustee does so invest the same in his own name, in trust nevertheless for his *cestuis que trust*; and where three different persons subscribe equal or unequal sums, making together one capital, and place the same out on mortgage in the name of a trustee for their common use; and we are authorized by the above cases to draw this conclusion, that one joint-tenant of money laid out on mortgage for his benefit in the name of a trustee, cannot foreclose without the concurrence of his companions in the joint-tenancy, whereas a tenant in severalty or in common having money on the same mortgage, and in the name of the same trustee as another person, may foreclose as to his principal, interest, and costs, without making the other person a party. And it should be remembered, that if two persons advance money in the same or in different proportions, without more, they will in equity be tenants in common, (*ante*, 671-2,) which reduces the application of *Low v. Morgan* to those cases only where the *cestuis que trust* are joint-tenants previously to the execution of the mortgage; and it is not at all improbable

Joint-tenant cannot foreclose without concurrence of companion. Contra of tenant in common. Semb. [now otherwise, infra.]

Sub-mortgagees must be parties.

So, if there be several derivative mortgagees, they must all be made parties to a bill to foreclose, in order that there may not be a multiplicity of suits (c2).

Persons advancing money on same security are prima facie tenants in common.

that a court of equity would even in this instance (to bring the case within the rule laid down in *Montgomery v. Bath*) construe the *cestuis que trust* to be tenants in common, which *prima facie* they are in equity taken to be, provided no recital or other declaration discloses the joint-tenancy. In *Rigden v. Vallier*, 2 Ves. 258, Lord Hardwicke said, that a court of equity has taken a latitude in construing a tenancy in common without the words "equally to be divided" on the foot of the intent; and has therefore determined, that if two men jointly and equally advance a sum of money on a mortgage, and take the security to them and their heirs, without any words "equally to be divided between them," there shall be no survivorship; and so if they were to foreclose the estate, the estate should be divided between them, because their intent would be presumed to have been so. See also similar law in *Morley v. Bird*, 3 Ves. 639. The cases however are not exactly parallel; but they assist in explaining the apparent discrepancy between the adjudications in the text.

Persons between whom mortgagee has divided money must all be parties to bill of foreclosure.

Mr. Belt, in his valuable notes to Bro. Ch. Ca. reduces the decision in *Low v. Morgan* to this principle, that one mortgagee, out of several interested, cannot sustain a bill to foreclose for his proportion alone, without making the other mortgagees parties. He adds, "*Montgomery v. Bath*, 3 Ves. 560, was contra; but the editor submits is evidently wrong, since it seems the principle upon which the above decision proceeds, is, that the mortgagor might otherwise be harassed with as many different suits as there were parties interested." 1 Bro. C. C. 368, n. (1). This without doubt is good law; but there is a material difference between splitting one mortgage into different sums and dividing it between several persons, and the case where several persons lend distinct sums in the first instance on the same security; for in the latter case there can be no harassing of the mortgagor with a multiplicity of suits, since he is, at the time of borrowing the money, aware how many suits can possibly be brought against him; but if each tenant in common were to divide his share of the money into several distinct portions, then Mr. Belt's observations would readily apply.

So must all persons who lend on a joint security.

This distinction however has not been followed. A case has lately been decided wherein two persons lent a sum of 12,000*l.* on mortgage, the one 2,000*l.*, and the other 10,000*l.* The party lending the 2,000*l.* filed his bill for foreclosure, and the question was—Whether a person who is entitled to a sixth part only of a sum of money due on a mortgage can file a bill for a foreclosure of a sixth part of the mortgaged estate. The Vice Chancellor held, that there could be no foreclosure or redemption unless the parties entitled to the whole mortgage money were before the Court. *Palmer v. Car-Hale*, 1 Sim. & Stu. 423.

(C2) But where a mortgage was made by N. to C. to secure 1,000*l.*, and C. assigned the mortgage to M. to secure 700*l.*; but no notice of the assignment was given to N., it was held, on a bill filed by N. against M. to have the mortgaged deeds delivered up, 1st. That C. was not a necessary party, as he had been examined as a witness and had admitted that N. had paid him his mortgage.

In a bill to foreclose, the case was (*g*), A. made a mortgage for a term of five hundred years, for securing 350*l.* and interest to B., who, so long before as 1705, assigned the term to C. redeemable by himself, on the payment of 300*l.* B. died, C. brought a bill against A. to redeem, or be foreclosed; and though but a derivative mortgagee, yet he did not make the representatives of B., the original mortgagee, parties. *Et per curiam*, here is plainly a want of proper parties; B. had a right to redeem C.; and to prevent another account, as to what is due upon the original mortgage, his representatives ought to be before the court.

*A mortgagee to B. for 350*l.* B. assigns to C. for 300*l.*—if C. forecloses, B. must be party (d).*

Courts of equity will never decree a foreclosure, until the period limited for payment of the money be passed, and the estate, in consequence thereof, forfeited to the mortgagee (*h*); for it cannot shorten the time given by express covenant and agreement between the parties, as that would be to alter the nature of the contract, to the injury of the party affected thereby.

No foreclosure till mortgage forfeited (u).

(*g*) *Hobart v. Abbot*, 2 P. Wms. 365. 1 Vern. 232. S. C. ante, [vol. i. 643. Mich. 1731. page 128.—*Ed.*]

(*h*) *Bonham v. Newcomb*, 2 Vent.

money; 2d. That delivery of goods by C. to N. was a valid discharge of the mortgage debt, and was a good payment as against M.; but, 3d. An account was directed as to what part of the mortgage money was paid, as C.'s evidence, from his conduct could not be admitted as a sufficient proof. *Norriah v. Marshall*, 5 Madd. 475.

(*D*) If the mortgagee assign his whole interest absolutely, and not by way of mortgage, Lord Eldon has said that the assignee will stand in the place of the original mortgagee, and that on a bill to redeem the latter will not be a necessary party; 9 Ves. 269; et vide ante, 933, in *notis*. Whence it may be inferred, that if the mortgagee has assigned not only the premises, but also the money to the plaintiff, he may foreclose without making the mortgagee a party; and, the circumstance of the mortgagor's having had no notice of the assignment will not, it is apprehended, vary the case.

[965 *]
Mortgagee having assigned, not necessary party to bill of foreclosure by assignee.

(*E*) But where a mortgage was made on the 19th January, 1759, with a proviso, that if the mortgagor paid 250*l.* on the 19th July, 1759, and 10,250*l.* on the 19th January, 1760, the mortgage should be void, and the 250*l.* was not paid on the 19th July, 1759, it was held that the condition was forfeited, and the estate of the mortgagee became absolute, and of a consequence that he might call in his money, or proceed to foreclose the redemption immediately. *Stanhope v. Manners*, 2 Eden, 197; et vide 2 Vern. 135.

Non-payment of interest, breach of condition.

On bill of foreclosure, mortgagee's title cannot be investigated or amended.

[966]

On a bill for foreclosure, the title of the mortgagee cannot be investigated; but he will be left to pursue legal means to establish it. And, therefore, where a mortgagee sued to have his money (i), or that the defendant should be barred of his equity of redemption; it happened that, by subsequent order, possession was directed to be given to the mortgagee, and contempt prosecuted for not delivering it accordingly; upon which the heir of the mortgagor set forth a title in his examination, that the mortgagee would have debated, but he was not admitted; it being insisted, that the course of the court, upon such a bill, was, and the court could go no farther than, to take away the equity of redemption, and leave the mortgagee to such title as he had, at law, but could not amend it; which the Lord Chancellor agreed to, and discharged the contempt (F).

Mortgagee may foreclose and eject mortgagor at same time.

A mortgagee may bring an ejectment, at law, at the same time that he hath a bill of foreclosure depending (h); for he will not be prevented from pursuing *all* his remedies for the recovery of his debts (g).

(i) *Anon.* 2 Ch. Ca. 644. S. C. *infra*, turned on the rules of pleading.—Ed.]
p. 988, in *notis*. This determination (h) *Booth v. Booth*, 2 Atk. 544.

(F) But if the estate and interest which the mortgagee is intended to take, or the title to that estate be defective, and the means of curing it are in the power of the mortgagor, he will be decreed to make the best title he can. See *infra*, page 988. This, indeed, the mortgagee may enforce on his covenant for further assurance.

Mortgagee may sue on all his remedies at once, and court will not prevent him.

(G) He may bring an action on the covenant to repay the money, serve an ejectment on the tenant in possession, file a bill to foreclose the equity of redemption, and arrest the mortgagor at the same time; but he cannot have his money and the estate too. See *ante*, vol. i. page 904, in the text, and note (I) there. In *Sunderlin v. Malone*, Irish T. R. 483, it was the unanimous opinion of the Irish Court of Common Pleas, that where a bond was given as a collateral security to a mortgage, the mortgagee might have sued both upon the bond and the mortgage at the same time. So it was held in *Garforth v. Bradley*, 2 Ves. 678, that a mortgagee might bring an ejectment and bill of foreclosure at the same time, which the court would not prevent; and it may be inferred from the case of *Colby v. Gibson*, 3 Smith, 516, that if the mortgagee should pursue *all* the before-mentioned remedies at the same time, which in appearance he could only do for the purpose of harassing the mortgagor, yet that a court will not interfere to restrain him. In that case a mortgagee filed a bill of foreclosure, and proceeded to execution in each

But special circumstances may arise, which will take the case out of the common rule, and induce the court to grant an injunction, to stay proceedings upon the ejectment. Thus, where a bill was brought by the plaintiff against the defendant (H), for an account of the rents and profits of an estate, during the time that he was guardian to the plaintiff's brother,

But ejectment stayed if mortgage appears satisfied, till that determined (H).

[967]

(I). *Booth v. Booth*, 2 Atk. 344.

ment, whereby he acquired possession, and received the rents and profits to the amount of 300*l.* a-year; he then brought an action of covenant against the mortgagor for the money, and obtained execution in that suit. The Court of King's Bench in England refused to discharge the defendant out of execution, assigning as a reason that the plaintiff had a right to pursue his remedies on all his securities. 33*Smith*, 516.

But where a simple-contract security for a debt is given, and afterwards a specialty security is taken, the latter merges and extinguishes the former, if the remedy given by the latter is co-extensive with that which the creditor had upon the former: where, however, one person being indebted to another gives him a promissory note and afterwards on being pressed for further security, by deed assigns to the creditor all his household goods, &c. as a further security, with a proviso that he should not be deprived of the possession of the property assigned until after three days notice: it was held, that this deed did not extinguish or suspend the remedy on the note, but that the creditor, notwithstanding the deed, might sue the debtor at any time; for it was clear from the whole deed, that the note was intended to continue as an existing security. *Twopenny v. Young*, 3 Barn. & Cress. 208, and note. Bail may be put in on an action of debt brought by a mortgagor against a mortgagee for the mortgage money. *Gidden v. Drury*, Farresley's Rep. 139. 5 C. 7 Mod. 139. Holt, 401. 15 Vin. Abr. 442, pl. 20.

(H) The case referred to supports this marginal deduction, and such was the principal point in it, but that does not appear in the text. Lord Hardwicke said, though the defendant was foreclosing the equity of redemption, yet he was not precluded from bringing an ejectment at law at the same time, unless there was something very particular to take it out of the common case. The only material question was, whether there were any grounds to presume that the mortgage was satisfied? As to the personal estate, it was most clear that the plaintiff's brother was an incumbered man, and that he made an assignment of it to a neighbour before his death. Then how could it be inferred from this, that the mortgage was satisfied: especially when two witnesses swore for the defendant, that upon his quitting and delivering up possession of the mortgaged estate, he did it upon these express terms, provided the interest due on the mortgage should be paid? However it was not quite so clear, his Lordship added, as the common case, being entangled with an account of the personal estate, and therefore if the plaintiff would agree to give security to redeem, an injunction to stay proceedings upon the ejectment should be directed, which might ultimately be of advantage to all parties, as it would keep the possession in suspense till the account was determined. *Booth v. Booth*, 2 Atk. 343.

Text corrected.

[967 *]

and for an injunction to stay proceedings upon an ejectment for the possession thereof, it being mortgaged by him; the court, because he was proceeding to foreclose the equity of redemption, it being entangled with an account of the personal estate, agreed to grant an injunction, provided the plaintiff consented to give security to redeem.

Mortgagee (having notice of voluntary settlement) procuring legal estate from trustees, refused decree of foreclosure against volunteer (1).

Although a mortgagee be, of right, entitled to a decree for foreclosure, after the estate becomes forfeited, if he act fairly, yet, if there be any injustice in the case, the court may refuse such decree (*m*). Thus, where a mortgagee, having notice of a voluntary settlement, procured the trustees of the estate to convey to him, to protect his incumbrance; the court, on a bill filed by him to foreclose the children claiming under the settlement, refused to do so; saying, that if he might be suffered to protect himself by getting in the legal estate, they would not carry it on by a decree in equity to foreclose.

Mortgagee of copyhold may foreclose before admittance.

A mortgagee of a copyhold estate, who is not in possession may exhibit his bill against a mortgagor, before admittance, for a decree of foreclosure (*n*); and, after he has obtained such a decree, may bring his ejectment for the possession of the mortgaged premises.

Dismissal of mortgagor's bill for relief equal to decree of foreclosure.

Where a mortgagee is made a party to a bill, praying relief [by the mortgagor (*o*), it] is the same thing as praying to redeem, for redemption is the proper relief; and if, upon a

(*m*) *Saunders v. Dehew*, 2 Vern. 271. *infra*, pages 975, and 1007, 8, as to S. C. ante, vol. i. p. 535. *fraud.—Ed.*

(*n*) *Sutton v. Stone*, 2 Atk. 101. (*o*) *Cholmley v. Countess Dowager of Oxford*, 2 Atk. 267. [S. C. ante, vol. i. p. 60; *et vide*

Volunteer necessary party to foreclosure, when.

(1) A person taking a legal estate from a trustee with notice of the trust, becomes himself a trustee, (*ante*, vol. i. 535.) If, in the above case, the mortgagee had not taken a conveyance from the trustees, he being a purchaser for valuable consideration, the voluntary settlement would have been void against him, notwithstanding the notice, see *ante*, p. 656, n. (D); but being a purchaser *pro tanto* only, an equity of redemption remained with the volunteers, and having notice of the settlement, the mortgagee was bound to make them parties to the bill of foreclosure, according to the rule or supposed rule submitted in p. 988, *infra*, in the note.

reference to a Master to see what is due for principal, interest, and costs, the plaintiff does not redeem the mortgagee, the court will, on his application, dismiss the bill, as against him, which is equivalent to decreeing a foreclosure (κ).

If the heir of the mortgagee exhibit a bill to have the mortgagor pay the money, or to be decreed to make farther assurance, and be foreclosed of redemption (p); it is a good cause of demurrer, that the executor of the mortgagee, who may have title to the mortgage-money, is no party.

Demurrer that mortgagee's executor is no party, allowed.

And, since it has been determined (q), that, in all mortgages the money belongs to the executor or administrator, and not to the heir; if it comes out, upon the hearing, that the executor or administrator [of the mortgagee] are not parties, the plaintiff in the cause [the heir of the mortgagee] cannot be permitted to proceed.

And proceedings stayed if that fact appear at hearing.

The executor of the mortgagor need not be party (r); for where, on a bill brought by a mortgagee against the mortgagor

Mortgagor's executor need not be party; contra of his heir (l).

(p) *Freak v. Hearsey*, 1 Ch. Ca. 51.
[S. C. 2 Freem. 180. Nels. Ch. Ca. 93.—Ed.]

(q) *Meeker v. Tanton*, 2 Ch. Ca. 29.
(r) *Duncomb v. Hansley*, 3 P. Wms. 335, n. [et vide S. L. ante, 963.—Ed.]

(K) In which case the motion to dismiss the bill with costs is of course on an affidavit of attendance at the time and place appointed by the report, and of non-payment of the money found due. *Stuart v. Worrall*, 1 Bro. C. C. 581. So, in *The Bishop of Winchester v. Paine*, 11 Ves. 194, it was acknowledged that in default of payment under a decree upon a bill for redemption would operate as a foreclosure.

Motion of course to dismiss bill to redeem.

But it is essential to subjoin this material distinction between the dismissal of a bill to redeem, for want of prosecution or any other cause in limine, and the dismissal of such a bill for non-payment of the money at the day appointed by the report. It was impossible said the court, in a late case, to contend that the dismissal of a bill to redeem for want of prosecution should have the same effect as a decree for non-payment of the money: for a dismissal for want of prosecution did not prevent the filing of another bill for the same matter. *Hunsard v. Hardy*, 18 Ves. 460. S. C. 4 ib. 466. 5 ib. 426.

Dismissal of bill to redeem for want of prosecution no foreclosure.

(L) But the mortgagor's heir will not be a requisite party when the equity of redemption has passed to a devisee, see ante, vol. i. pages 269 and 492; et vide *Cholmondeley v. Clinton*, 2 Jac. & Walk. 135, where it was made a serious question, whether a devisee and heir at law should both join in a bill

Heir and devisee of mortgagor.

to foreclose; it was objected, that he ought to have been a party, as it did not appear, but that he might have paid the debt; it was held by the Master of Rolls and the Register, that there was no necessity to make him party; because, the bill being *only* to foreclose the equity, the plaintiff need *only* make *him* a party that *had* the equity, *viz.* the heir; and the course was so; neither was the mortgagee any ways bound to intermeddle with the personal estate, or run into an account thereof; and, if the heir would have the benefit of any payment made by the mortgagor or his executor, he must prove it (M).

claiming an equity of redemption, upon the allegation that questions having arisen as to which of them was entitled to it, they had agreed to divide it between them. Sir T. Plumer, M. R. thought the bill should have been by the devisee alone, praying a separate redemption, and that the heir should not have been a co-plaintiff, but a defendant, if a party at all; nevertheless his Honor seemed very dubious on the point. As to the mortgagee's devisee, see *infra*, pages 979, 80.

Mortgagor's executor unnecessary party to foreclosure, even where mortgage is for years.

(M) This doctrine has been confirmed by the case of *Bradshaw v. Ostrum*, 13 Ves. 234. There a tenant in fee-simple made a mortgage by creating a term of 1000 years, with a proviso in the usual manner to be void upon payment by the mortgagor, his heirs, executors, or administrators. A bill to foreclose was filed against the infant heir at law of the mortgagor, and also against his executrix. It was objected that the executrix was not a necessary party; for that no decree could be had against her, and therefore that so much of the bill as sought a foreclosure against the executrix, should be dismissed with costs. It was contended for the mortgagee, that he had a right, if he pleased, to bring the executrix before the court; and the mortgage in the present instance being for a term of years, it was absolutely necessary to make the executrix a party; for the mortgagee could not have a foreclosure unless in the first instance he brought forward the personal representative of the mortgagor who might redeem; and who, if not made a party, might after the foreclosure tender the money; and as the personal representative was bound to pay the mortgage, if she had assets, this was submitted to be the proper time to call upon her for such payment. Sir Wm. Grant, M. R. observed, that with the present species of term the personal representative had nothing to do; it was created only by being mortgaged. The executor was named in every mortgage deed; and in every case the personal representative was to pay, if there were assets, though the heir was to have the benefit. But as this was a mere matter of practice, further inquiry should be made upon it. The bill was ultimately dismissed against the executrix by consent, but without costs. 13 Ves. 236. The short note of *Meeker v. Tanton*, 2 Ch. Ca. 29, is contra; but the word "mortgagor" there inserted in the second line was most probably intended for "mortgagee;" without this correction the case is inconsistent and

But a foreclosure, obtained on a bill exhibited by the heir at law [of the mortgagee] will be binding (s), although the executor or administrator [of the mortgagee] be not a party; for if the executor or administrator should afterwards come against the heir to have the benefit of the mortgage, the heir, in case the land be worth more than the money, may pay him the money, and take the benefit of foreclosure to himself (ss).

Decree obtained by mortgagee's heir, binding on his executor, though latter no party.

When the heir of the mortgagee had foreclosed the mortgagor, the executor of the mortgagee being no party (t); upon a bill, by the executor, against the heir of the mortgagee, and against the mortgagor, the land was decreed to the executor.

But heir in this case, though trustee for executor, may take land on paying money.

(s) *Clarkson v. Botyer*, 2 Vern. 66.

(t) *Globe et Ux. v. Earl of Carlisle*,

(ss) [See the same law, ante, 666, n. (E).—Ed.]

cited in *Clarkson v. Botyer*, 2 Vern. 66.

unintelligible,—in its present reading, it speaks of the executor or administrator of the mortgagor being entitled to receive the money.

P. 969
continued.

But though the law may be thus stated, yet in a late case it was considered necessary by the present Master of the Rolls to make the executor of a mortgagor a party, where on the face of the bill it appeared that he had been in receipt of the rents and profits of the mortgaged premises, and had paid the interest and part of the principal. The executor in this case was an essential party to the account to be taken of what was due on the mortgage. The bill anticipated this objection, and stated as an answer to it, that the personal representative could not be found. That was negatived by the answer. The executor was shewn to be living, and his residence pointed out. "The bill was therefore defective in this particular." Per Sir Thomas Plumer, M. R. in *Oldmundeley v. Clinton*, 2 Jac. & Walk. 135. To a bill which prays a sale instead of a foreclosure, the personal as well as the real representative of the mortgagor must be a party; for it is requisite to shew that the personal estate has been applied before the court will decree the real estate to be sold. *Daniel v. Skipwith*, 2 Bro. C. C. 153. *Fell v. Brown*, ib. 276; so if a bill be filed by a mortgagee for the execution of a trust for sale by way of mortgage, the personal representative of the mortgagor will be a requisite party; for if the person having the legal title, and being competent to sell, will have the assistance of the court, all who are interested in the result of the sale must be parties, that the whole of their claims may be arranged by the decree. *Christophers v. Sparks*, 2 Jac. & Walk. 229. A form on this subject will be found in the Third Volume. And if there be one mortgage of freehold and leasehold estates together, and the mortgagor dies, both his heir and executor will be necessary parties to a bill of foreclosure. *Robins v. Hodgson*, Harr. Ch. Prac. 30.

Except he has received part of rents, or where bill is for sale, or where mortgage is of freehold and leasehold property together.

But it is observable that, in the last case, the heir made no offer to pay the mortgage-money to the executor, which is the basis of the resolution in the former case (N).

Mortgagee's heir necessary party to bill of foreclosure by his executor.

(N) It may be proper to add in respect of the mortgagee, that his executor cannot file a bill to redeem or be foreclosed, without making the heir of the mortgagee a party; for if the mortgagor should redeem, there will be no one before the court from whom a conveyance of the legal estate can be taken. No direct authority can be found for this position; but it was evidently acted on in *Wood v. Williams*, the case next cited.

Trustee having legal estate, necessary party to foreclosure.

Where, on a bill to foreclose, the mortgage was stated to have been made by demise to one Holt, but that he was only a trustee for the plaintiff, who advanced the money, and that Holt had executed a declaration in writing whereby he declared, that his name was made use of in the mortgage deed as a trustee for the plaintiff; the Vice-Chancellor said it was necessary that Holt the trustee, should be a party to the suit; for it was his legal estate which was to be protected by the decree of foreclosure, and he was a necessary party to an immediate re-conveyance, if the defendant should redeem. His Honor therefore ordered the cause to stand over, with liberty to amend, by adding parties, the plaintiff paying the costs of the day. *Wood v. Williams*, 4 Madd. 186; et vide *S. L. Carew v. Johnston*, 2 Sch. & Lef. 295; and further, as to trustees, ante, vol. i. 402, n. (K).

Bankrupt unnecessary party to foreclosure.

If the mortgagor become bankrupt, he will not be a necessary party to a bill of foreclosure by the mortgagee; it will be sufficient if the assignees are before the court. *Adams v. Holbrooke*, Harr. Ch. Pr. 30. But in *Bainbridge v. Pinhorn*, 1 Buck. B. C. 135, where the bill was for a foreclosure against the assignees only, without the bankrupt being made a party to the suit, it was insisted, that as no bargain and sale of the bankrupt's real estate had been made to the assignees by the commissioners, they had no interest, and that the bill could not, consequently, be supported for want of equity in the defendants. On the other side it was contended, that notwithstanding the bargain and sale had not been executed, yet, as the assignees had a right to call upon the commissioners at any time to execute it, they had such an interest as might be the subject of foreclosure. The Master of the Rolls said, that if the assignees had not any interest in the estate, the mortgagee could not perfect his title by foreclosing them; but the usual decree of foreclosure was ultimately pronounced, which of course decided against the necessity of making the bankrupt a party. In a late case, Sir John Leach, V. C. went fully into the subject, and has made ample amends for the loss of his Honor's judgment in *Bainbridge v. Pinhorn*.

Though no bargain and sale has been made from commissioners to assignees.

The case alluded to was exactly similar to that of *Bainbridge v. Pinhorn*, ubi supra, (except that the bankrupt was made a party to the suit)—the simple question being, whether, on a bill to foreclose, a mortgage of a copyhold estate, made by a person who afterwards becomes bankrupt, and whose estates have not been assigned to his assignee, the bankrupt is a necessary party? The Vice-Chancellor said it laid upon the plaintiff (the mortgagee) to shew that in some way in which the suit might terminate, it was necessary for his protection that the bankrupt should be a party. The suit must termi-

A plea of a decree for foreclosure in the common form, with an averment of non-payment of the money, &c. *but no final order for foreclosure*, on appeal from Lord King, was held *Plea of foreclosure without final order, bad (tt).*

(tt) [For the estate does not lose the quality of a pledge until the final order of foreclosure has been pronounced. *Thompson v. Grant*, 4 Madd. 438.—*Ed.*]

nate either in redemption or foreclosure. If the assignee, being the sole defendant, redeemed the plaintiff, and he re-conveyed the estate to him, it was not alleged that the absence of the bankrupt from the suit could be a prejudice to the plaintiff. The only question was, whether in case the plaintiff obtained a decree of foreclosure against the assignee alone, it could prejudice the plaintiff that the bankrupt was not made a party to the suit? It was true that an equity of redemption was an interest in real estate; and it might be well to consider the general question, whether the bankrupt before the bargain and sale was a necessary party to every suit in which the plaintiff asserted a claim upon the bankrupt's real estate against the assignees? The real estate of the bankrupt was not formerly taken out of him until a bargain and sale was executed; but the effect of the bankrupt laws was immediately to vest the real estate of the bankrupt potentially, though not formally, in the assignees. They could call for the formal transfer at their pleasure, and the real estate of the bankrupt was as much bound by the contracts of the assignees before the bargain and sale as it was afterwards. Before the bargain and sale, therefore, all beneficial interest was out of the bankrupt, and he differed from every other person who in form retained a legal estate; he had no power of affecting that estate; and it passed from him, not by his own act, but by the act of others, and without his will. Having thus neither interest nor power in the subject of the suit, which required to be bound by the decree of the court, it was difficult to conceive any principle upon which he could be considered as a necessary party. If it were said there was a possibility that the bankrupt might thereafter acquire the property of his real estate unconverted, by payment of twenty shillings in the pound to his creditors, the answer was, that such a mere possibility was not an interest; and that in the mean time his estate was fully represented by his assignees, and he was bound by their acts alone out of court, and must be equally bound by their presence alone in court. That a bankrupt should be joined as a party-defendant to every bill filed before a bargain and sale respecting his real estate, would be equally vexatious and oppressive to the plaintiff and to the bankrupt; to the plaintiff, because the expences of the suit would be increased by the presence of a party who could not pay him costs; and to the bankrupt, because he would have no means of defence, and no interest to defend. If, however, it could be generally necessary, that in a question respecting his real estate, the bankrupt should be a party before the bargain and sale, it would not follow that he must be a party to a bill of foreclosure. After a mortgage in fee, no estate was in form left in the bankrupt. The equity of redemption was not an estate but an interest, [see, as to this, ante, vol. i. p. 252, *in notie*] and might well be considered as substantially vested in the assignees before a bargain and

Contracts of assignees before bargain and sale, binding.

not to be good (u); for, although such plea and length of time might be a good defence, yet, as a plea, it could not stand for want of a final order.

(u) *Senhouse v. Earl*, 3 Ves. 450.

Bargain and sale not necessary to give assignees right to redeem.

sale. Whatever therefore might be the case with respect to real estate, generally, it would be difficult to establish that it was necessary to give the assignees a title to redeem against the mortgagee, that there should be a bargain and sale of the equity of redemption; and still more difficult to establish, that if the estate were not worth redemption, there should be a bargain and sale in order to give force to a decree of foreclosure against the assignees, or to a release from them of the equity of redemption. Upon the whole therefore the learned judge was of opinion, that although there was no bargain and sale, a decree of foreclosure against the assignees alone could never be impeached by the bankrupt; and further, that although there were no bargain and sale, the bankrupt could never impeach a release of the equity of redemption, if the assignees, in order to save the expence of a suit for foreclosure, should think fit to execute such a release. *Lloyd v. Lander*, 5 Madd. 288.

[972 *]
Release of equity of redemption by assignees alone binding on bankrupt.

Bankrupt having deeds, not necessary party. Semb.

In the above case it was said, that the bill charged that the deeds and muniments were in possession of the bankrupt, and prayed a delivery of them, and that for this purpose he was a necessary party. But the Vice-Chancellor over-ruled that objection, observing, that though the bill charged generally that the confederates had in their power deeds and papers, yet this could not be understood as making a charge against the bankrupt specially, and was rather to be referred to a possession of the confederates, according to their rights and interests. 5 Madd. 291.

Surety must be party to bill of foreclosure against principal.

In reference to the parties, it is further observable, that a bill of foreclosure against one of two mortgagors, to whom an entire sum has been lent, will not lie without bringing both of them before the court, although the mortgage be of two different estates. *Stokes v. Clendon*, Rolls, 3d December, 1790. In this case there was a mortgage by the principal of one estate, and a mortgage by the surety of another, as a collateral security, and the Master of the Rolls determined, that a bill of foreclosure against the principal only could not be sustained without making the other mortgagor a party, because such other mortgagor had a right to redeem and be present at the account, to prevent the burthen ultimately falling on his own estate, or at least falling upon it to a larger amount than the first estate might be deficient to satisfy. The bill was ordered to stand over for want of parties. From Lord Colchester's MSS. cited 2 Bro. C. C. 275, Belt's edit. n. (1). 3 Swan. 150. Et vide infra, p. 1013, as to foreclosing a mortgage of part of the estate; and ante, vol. i. p. 339, n. (2), for the cases on the necessity of redeeming both estates or neither.

Lessee.

A lessee may redeem, but it does not appear that he is a necessary party to a bill of foreclosure. For the parties to a bill of redemption, see vol. i. p. 402 to 405; et ante, 953.

Judgment.

A judgment creditor prior to a mortgage need not make a subsequent mortgagee a party in order to postpone him. *Shepherd v. Guinanet*, 3 Swan. 151.

On a decree to foreclose at a period certain, the computation of time must be according to calendar months, and not according to lunar ones (*x*).

Calendar not lunar months.

A decree to foreclose tenant in tail of an equity of redemption, will bind his issue, and also those in remainder, who are no parties to the mortgage; because the equity of redemption is a right set up *only* in a court of equity, and may be there extinguished.

Decree of foreclosure on tenant in tail, binds issue and remainder-man (o).

Thus where, in May, 1613, R. on his marriage with D. his wife, settled lands on himself for life, remainder to D. for life, remainder to the heirs male of his own body, and then died, having issue, C. his first, and H. his second son (*y*). D., his

So decree on tenant for life binds remainder-man (p).

[973]

(*x*) *Anon. Barn. 324. S. C. 2 Eq.* (*y*) *Roscarrick v. Barton, 1 Ch. Ca. Abr. 605, pl. 38. 217.*

(O) This is analogous to the rule of law, that a tenant in tail may join the *mesne* in a writ of right. In all adverse real actions the tenant in tail supports the rights and interests which relate to the inheritance, and defends for those in reversion or remainder, as well as for the interest of himself and his issue. 1 Prea. Abst. 407.

Tenant in tail represents remainder-man.

(P) This ancient determination has long since been over-ruled; and it is now settled, that the tenant for life and person having the next vested estate of inheritance should be parties to the bill of foreclosure, as also any intervening tenants for life whose estates are vested; see *infra*, p. 974, et seq. and note to the latter page. The only case where a foreclosure will be decreed against a tenant for life and the parties before the court, without the remainder-man, is, where the remainder-man is abroad. But then such foreclosure will not be final nor relieve the mortgagee from the necessity of keeping accounts. Thus in *Fishwick v. Lowe*, 1 Cox, 411, a bill to foreclose was preferred against the tenants for life, and some incumbrancers under the will of the mortgagor; but the tenant in tail was abroad and out of the jurisdiction; and a doubt arose, whether the court could decree a foreclosure without the tenant in tail being made a party. Sir L. Kenyon, M. R., said, he had looked into the cases which he thought most probable to bear any analogy to the present, but they did not apply; that it was not like the case of parceners, for there you might proceed to summons and severance; yet his Honor thought he might make the decree against the parties before the court; at the same time he could not conceive how it could be worth the plaintiff's while to take such a decree. In the common case a foreclosure was convenient, because it relieved the mortgagee from keeping an account of the rents and profits; but here the tenant in tail might compel an account over again whenever he thought fit. However, if the plaintiff chose it, his Honor would decree a foreclosure against the present defendants; and the usual decree was made.

Foreclosure against tenant for life only, remainder-man being abroad.

[973 *]

widow, married with G., and they entered on the lands in question as D.'s jointure. C., the son, in November, 1638, for 800*l.* conveyed these lands by deed, fine, and recovery, to G. and his heirs, to the use of D. for life, remainder to the use of C. and his heirs, till he failed to pay several sums, amounting to 800*l.* at several days, and after default of payment of any of these sums, to G. and his heirs. Afterwards, in 1639, C. on his own marriage, settled these lands on himself for life, remainder to M. his wife for life, remainder to his first and other sons in tail, *remainder to H. in tail.* In 1650, G., with the consent of C., assigned his estate, which was for the security of the 800*l.*, and was forfeited to B. In 1656, B. obtained a decree to foreclose, unless C. paid him what was due; C. died without issue male; D. lived till 1668; then H. exhibited his bill to redeem, alleging that he, being no party to the decree, and C. but tenant for life, it could not bind *him*. But the court were of opinion, that H. ought not to be admitted to redeem; and Lord Chief Justice Hale said, he was of opinion, that there was no colour for such a decree; that it had gone far enough, and that he would go no farther than precedents in the matter of equity of redemption, which had too much favor already; there should be no decree for H. in respect of the antiquity, for if he would redeem, he must come in time. It was but just to foreclose for not coming in time; and a decree to foreclose tenant in tail should bind his issue in an equity of redemption. The estate moved from C. to B., and not from H.; and C. was the visible possessor and owner. It was a great sore, that mortgagees were but bailiffs; and the limitation to H. was but voluntary, so his pretence was not to be supported against a purchaser, for so a mortgagee was (*yy*); here the purchase was made absolute by the decree, and if there were divers remainder-men of the equity, there would be no occasion to make them *all* parties.

[974]

Release of equity of redemption by tenant in tail after decree to account, equal to absolute foreclosure by order.

And a release of the equity of redemption by tenant in tail, under a subsequent settlement, after a decree for an account and foreclosure, is tantamount to an absolute foreclosure by order.

(*yy*) [S. L. antc, vol. i. page 281, and 9 Mod. 396.—*Ed.*]

Thus (s), where H., being seised in fee, mortgaged for years, and afterwards in 1734 made his will, and devised his estate to his son and his heirs, subject to an annuity to his wife for life, and to the incumbrances upon the estate; and, in case his son should die without issue, to be divided amongst his three daughters, or such of them as should be living at the death of his son; and if his son and daughters should all die without issue, then to his wife for life, remainder to his own right heirs. A bill was brought by P. as assignee of the original mortgagee, against the widow of the mortgagor, and her son, who was then an infant, to foreclose the equity of redemption; but the daughters were not made parties. In 1746, the cause was heard, and a decree made for an account and foreclosure, unless redeemed by the mother or son. The account was taken before the Master, and the time for redemption being several times enlarged, and at last elapsed, the son, having attained twenty-one, released the equity of redemption; so that the foreclosure was not made absolute against him, but was made absolute against the wife. The son afterwards died without issue, and R., having bought the daughter's interest for a trifle, in 1765, filed a bill to redeem. But the Lord Chancellor was clearly of opinion, that P. was not entitled to redemption. *That the first tenant in tail being a party to the foreclosure was sufficient. That he sustained the interest of every body, and those in remainder were considered as cyphers.*

First tenant in tail party to bill of foreclosure, sufficient.

That it would be very inconvenient if the remainder-men were necessary to be parties. There might never be an absolute foreclosure. The account would be endless, and the foreclosure would be open to every contingent remainder-man. That nobody would lend money upon such terms. That the release, in this case, was equal to an absolute foreclosure by order. That the accounts were taken, and the time for redemption elapsed, and that this case was not so strong as that of *Roscarrick v. Barton* (a).

[975]

But it was observed, in the preceding case, that the length of time elapsed after the receipt and foreclosure was an additional circumstance against the relief prayed, and that the

(s) *Reynoldson v. Perkins*, Amb. Rep. 54.

(a) 1 Ch. Ca. 217, ante, 973.

plaintiff appeared to have purchased the daughter's interest for a trifle, and was trying an experiment.

Tenant for life and person having next vested estate of inheritance necessary parties (a).

But, although in such case, where there is a clear tenancy in tail, there is no occasion for the remainder-man's being a party to a bill of foreclosure (b), yet if there be an express estate for life [and it remains doubtful whether that person be

(b) *Sutton v. Stone*, 2 Atk. 101.

Trustees to preserve contingent remainders necessary parties to bill of foreclosure.

(Q) This, in the instance of a strict settlement, would exclude the trustees to preserve contingent remainders, who have not estates of inheritance but merely vested estates descendible to heirs during the life of the particular tenant; but it is apprehended that such trustees will be necessary parties before the birth of issue, and whilst it remains uncertain in whom the next remainder will vest, and perhaps till the arrival of such issue to the age of twenty-one, when their office virtually determines, there being then no contingent remainder to support, and it may be contended, that they will be necessary parties in every event; for, that supposing the tenant for life to commit a forfeiture of his life interest, the estate of the trustees or their heirs will immediately vest in possession, which would be outstanding if they were not personally foreclosed; besides trustees, to preserve contingent remainders, may redeem for the benefit of those whose estate and interest they are appointed to support, provided the tenant for life neglects or refuses to exercise equity of redemption; which, on principle, should decide the question in the affirmative; viz. that trustees, to preserve contingent remainders, will in every event, be necessary parties to a bill of foreclosure. The Master of the Rolls in the great case of *Cholmondeley v. Clinton*, (2 Jac. & Walk. 135,) was of this opinion. He said it was sufficient to bring before the court the trustees, and the person *in esse* entitled to the first vested estate of inheritance; those who had contingent interests were not necessary parties; and Lord Hardwicke considered that the established rule in *Hopkins v. Hopkins*, there cited, *quod vide*.

Trustees to preserve contingent remainders decreed to join in sale, there being no issue after ten years, and foreclosure threatened.

In one case trustees to preserve contingent remainders in a marriage settlement, there being no issue, were decreed to join in a sale where a foreclosure was threatened. In the case alluded to, S. made a mortgage of the lands in question for the term of 1000 years, to secure 1000*l.* and interest, and afterwards upon his marriage, settled the lands in mortgage to the use of himself for life, with remainder to the use of trustees during his own life to support contingent remainders, with remainder to his wife for life, with remainder to his first and other sons in tail, with ultimate remainder to his own right heirs, and having no issue, settled to sell the lands to P., who brought his bill in equity and set out the foregoing matters; stating also that the trustees refused to join, that the mortgagee threatened to enter, and prayed a specific execution of the agreement, and that the trustees might be decreed to join in the conveyance. S. and his wife, by answer recited the settlement, and said that they had been married six [ten] years, [Reg. Lib.] and had no issue, and con-

not also tenant in tail,] the remainder-man [who has the first vested estate of inheritance,] ought to be a party.

fessed the contract with P., and that they were willing to perform it. The trustees expressed their willingness to do as the court should direct, being nevertheless indemnified. For P., it was insisted, that the settlement being only of an equity of redemption, the mortgagee was not bound thereby, but might not only enter, but foreclose, which would bind, though there should be issue afterwards born; and that the husband and wife not being able to redeem, a sale was absolutely necessary, otherwise the benefit of redemption would be lost as well to the husband and wife as also to the issue, in case there should be any. The Master of the Rolls decreed the trustees to join in the sale, and to be indemnified, the settlement being only of an equity of redemption, and the wife being in court and examined whether she freely consented therunto or not.—“The decree is so,” adds Mr. Raithby, note (Y), “but there is no reason stated, except that the premises appear to be of small value. Reg. Edw. 1695. B. fol. 54.” *Platt v. Sprigg*, 3 Vern. 303.

As to the possibility of issue being extinct, a court of law will not presume this fact until the death of one of the parties; but there are instances where a court of equity has exercised a discretionary power over trustees for preserving contingent remainders, and directed them to convey and even to join with the tenant for life in barring the subsequent contingent limitations, on the presumption that the parties will not have any children. This, however, has only happened under peculiar circumstances; either of pressure to discharge incumbrances prior to the settlement; or in favor of creditors where the settlement was voluntary; or for the advantage of the persons who were the first objects of the settlement, as to enable the first son, &c. to contract an advantageous marriage. But: *Ferne*, 534. Nevertheless, in *Duric v. Weld*, 1 Vern. 181. S. G. 1 Eq. Ca. Abr. 386, pl. 5, where the husband and wife, after being married twelve years without having any issue, filed a bill against the trustee, that they might be enabled to sell part of the land for payment of debts, Lord Keeper Guildford said, he did not know how to make such a decree, for he had known where people had been married near twenty years without issue, and after had children; though at the plaintiff's importunity, he gave time to attend him with precedents.—The jurisdiction of the court to exercise its discretion in these cases has never been doubted; but the task of deducing from the conflicting cases the true principle of decision, has been confounded by an eminent judge to be greater than he had abilities well to execute, see the observations of my Lord Eldon, in *Bloss v. Perkins*, 1 Ves. & Bea. 491. But to return.

Effect of presumption in equity that possibility of issue is extinct.

The intermediate tenants for life should be parties to a bill of foreclosure, in order to give them an opportunity of redeeming. This was decided in *Gore v. Stockpole*, 1 Dow Par. Rep. 181. S. C. on other points, ante, vol. i. 549, in notes. The case was this:—The mortgagor devised his equity of redemption to A. for life, with remainder to B. for life, with remainder to his first and other sons in tail male, with remainder to C. for life, with remainder to his first and other sons in tail male, with remainder to D. for life, with remainder to E. for life, with remainder to his first and other sons in tail male, with remainders

Intermediate tenants for life should be parties.

Party incumbrancers bound.

If there be many incumbrancers, some of whom are not

over. A. died soon after the testator, and B. died in his life-time (without sons, as it is presumed, but that fact does not appear on the report), whereby the remainder to C. fell into possession. C. was a minor, and one F. obtained letters of guardianship of his person and estates. In 1731, the mortgagee filed a bill of foreclosure in the Irish Court of Exchequer against C. the minor, and the executors of the testator; to which bill the minor, by his guardian, put in an answer; and in 1733 a decree was pronounced (according to the usual mode of executing a foreclosure in Ireland) that the equity of redemption should be foreclosed, that the estate should be sold, the mortgagee paid his money, the surplus returned to the defendants, and that all proper parties should join in the conveyance. The final decree was pronounced in 1733, at which time D. and E., the remainder-men for life, were both living, but neither of them were made parties to the foreclosure. In 1746, soon after C. became of age, the decree was revived and the mortgaged estates put up to sale by the Deputy Remembrancer, and were, in pursuance of a previous arrangement between C. and his agent, bought in at considerably less than their value; but they were afterwards sold to three different persons, two of whom, if not all three, were cognizant of the will, and of the manner of obtaining the decree of foreclosure; but they had suffered recoveries, apparently for the purpose of strengthening their titles. C. died in 1796 [without sons,] and in the same year a son of E., who was the next remainder-man in tail, filed his bill against the mortgagee and purchasers for redemption, which bill Lord Clare, C. dismissed with costs as to the purchasers, probably on account of the recoveries and length of time (fifty years); but directed it to stand over as to the mortgagees.

[977*]

Foreclosure against tenant for life, not binding on remainder-man.

The cause came on for further directions in November, 1803, before Lord Redesdale, who pronounced a decree, declaring, "That as none of the persons in being, and entitled to remainder, were made parties to the proceedings in the cause in the Exchequer, although the parties to such cause had notice of the mortgagor's will, the same being set forth in the pleadings; and as the said minor was tenant for life only of the estates under such will, the proceedings in that cause did not in any manner bind the rights of the parties entitled to estates in remainder, and such proceedings were on the face of them erroneous, and wanting the necessary parties to give them force and effect, and that the same, under the circumstances, ought to be deemed fraudulent, collusive, and void, as against the plaintiff, and all persons entitled in remainder under the mortgagor's will." The decree then ordered, that the legal estate in all the mortgaged lands should be re-conveyed to the plaintiff, except those sold to two of the purchasers, the decree of dismissal as to them having been enrolled, and so not capable of being re-heard in the court below. To reverse this decree as to one of the purchasers who had clear notice of the fraud, an appeal was lodged by the remainder-man in tail, in the English House of Lords. It was there contended, that C., the minor, could not pass any thing more than his life interest in the mortgaged premises; and that nothing in the transaction ought to be permitted to injure the appellant, or to deprive him of his just rights.

Lord

made parties to a bill to foreclose(c), the plaintiff, in the

(c) *Draper v. Jenning*, 2 Vern. 518. parties to a bill of foreclosure, in respect of the incumbrancers.—Ed.]
[et vide infra, 989, note (C), for further observations on the necessary

Lord Redesdale, in the English House of Lords, observed, that the cause was carried on in such a way in the courts below, as to leave the Judges in the belief that C., the minor, was the absolute owner; and that the decree of foreclosure was pronounced, and the surplus of the purchase-money ordered to be paid to the said C. under that impression. It was impossible not to see that there was in course of the proceedings the most cautious suppression of facts with which the court ought to have been made acquainted. The sum too which should have been paid out of the estates, so as to affect the interest of the remainder-man, was the original amount of the mortgage money only, the interest ought to have been kept down by the tenant for life, and such should have been the directions of the court. And as to the other purchaser against whom the decree of dismissal was permitted to remain undisturbed, on the ground that he had no actual notice of the fraud, Lord Redesdale thought it very doubtful, whether a purchaser for valuable consideration under a decree of the court fraudulently obtained, though ignorant of the fraud, could protect himself, when the fraud appeared on the face of the proceedings. Another objection, his Lordship said, was, that the proper course would have been to file a bill in the Exchequer, to set aside the decree on the ground of fraud. The answer to that was, that the decree neither did nor could bind the remainder-man at all, but only the tenant for life. The clearest title could not be used by a person cognizant of any fraud affecting it; and by the register statute even a registered deed could not be used against an unregistered deed, if the person in whose favor the registered one was made knew of the prior unregistered deed. [S. L. n. (P), ante, 625]. His Lordship then concluded with the remarks mentioned in a former page, ante, vol. i. 549, *in notis*. Lord Eldon said, that on the best consideration he could give the subject, he had no doubt but the decree in the Exchequer did not bind the remainder-man, for it was clear equitable law, that in order to make a foreclosure valid against all claimants, he who had the first estate of inheritance must be brought before the court, and even then, the intermediate remainder-men for life ought to be brought before the court, to give them an opportunity of paying off the mortgage if they thought proper. A bill of review in the Exchequer, to set aside its decree, could not have answered the purpose of the appellant, for as to him this fraudulent decree was an absolute nullity. And as to the lapse of time, Lord Eldon thought the appellant had acted in proper time, unless he had given such encouragement to the respondents (to make them believe themselves secure, and had induced them to improve and deal with the property as if it had been securely their own,) as would make it a fraud in him to prosecute the present claim. [See further as to this, ante, vol. i. 437, n. (H). This had been alleged by the respondents, and was the only material point on which his noble friend had not touched. Lord Eldon was of opinion,

Judgment in Gore v. Stackpole.

Person having opportunity of discovering fraud, presumed to know it.

Latest general rule as to parties to foreclosure.

[978]

Acquiescence in fraud, binding, when.

bill, may notwithstanding foreclose such defendants as he has brought before the court.

however, that there was no foundation in the case, for any objection on that ground. The judgment of Lord Clave was then reversed, 1 Dow P. C. 32.

The conclusion from these cases is, (what indeed it is almost needless to draw,) that the mortgagor cannot by enveloping the equity of redemption in a deep line of future and contingent limitations, disappoint or postpone the mortgagee of his immediate remedy by foreclosure.

Mortgagor executes composition deed, and is afterwards declared bankrupt, collusive foreclosure against assignees only, without trustees of deed, set aside, and mortgagor charged with costs.

Another late case on the subject of fraud and collusion, in reference to the parties to the bill of foreclosure, may be properly added here. The mortgagor after he had executed a mortgage to the plaintiff, conveyed his equity of redemption to trustees, upon trust to sell for the payment of his debts. Two years after, he became bankrupt, and the assignees, conceiving that some act of bankruptcy had been committed prior to the trust deeds, or that the execution of those deeds was in itself an act of bankruptcy, filed a bill in the Exchequer, for the purpose of having them cancelled, and to restrain the trustees from proceeding for recovery of the rents. In this suit they obtained the common injunction for want of an answer, which, on the answer coming in, was dissolved, and it did not appear that any farther proceedings had been taken. The mortgagee then filed a bill of foreclosure against the assignees, as the persons entitled to the equity of redemption, not noticing the trust deeds. In the progress of this suit a verbal agreement was entered into between the solicitors of the mortgagee and of the assignees, that a decree of foreclosure should be suffered to pass; that a sufficient part of the mortgaged premises should then be sold, to pay what was due on the mortgage, and that the remainder should be given up to the assignees. In consequence of this agreement, a final decree of foreclosure against the assignees was obtained in April, 1813. The answer of the assignees was taken without oath. The bill in the present suit was filed in May, 1813, by the trustees of the composition deed, praying that the decree of foreclosure might be declared void, and that the plaintiffs might be admitted to redeem. It also stated, that the mortgagee had collusively permitted the assignees to receive the rents of the mortgaged premises, and prayed that he might be charged in account with these sums. At the hearing, the counsel for the mortgagee gave up the question as to the plaintiff's right to redeem, and contended merely against being charged with costs. He said, that the mortgagee's reason for not joining the present plaintiffs in his former suit was, that he conceived their deed to be void; and though he was misadvised in this, the court would not go so far as to give costs against a mortgagee, merely from his having proceeded by mistake and having made an erroneous defence. The Master of the Rolls observed, that the defendant's counsel had very properly admitted what had reduced the case to the only real question, that of costs. It was said, indeed, that the mortgagee thought the trust deed void, but if he had entertained that opinion, what injury would it have done him to have made the trustees parties, and so to have given them at least an opportunity of agitating the question? But it was clear that it was not a mistake; if so, how was it that he insisted on the decree in

But those [incumbrances who are] not parties to the suit will not be bound by such decree, [and they will be allowed to redeem after the foreclosure has been signed and enrolled] (d). Thus, where R. mortgaged his estate to S. for 99 years, to P. for 40 years, then to T., the plaintiff's husband, for 1500% and afterwards to B.; B. brought in the two first mortgages; then the plaintiff, administrator, *durante minore etate*, exhibited a bill against R. and B., setting forth a title, to discover the defendant's title and redeem; to which the defendant answered, but no farther proceedings were had by the plaintiff. B. had notice of the plaintiff's title; then B. notwithstanding exhibited a bill against R. alone, to redeem or be precluded, and obtained a decree; during all this time R. was in possession. After preclusion of the defendants of the last bill, C. brought B.'s interest, and then the plaintiff, the widow of T. brought a bill to redeem, to which C. pleaded his purchase and

Sed accurs of those who are not parties (dd).

(d) *Sherman v. Cox*, 3 Ch. Rep. 84. S. C. Nels. Rep. 71. [3 Freem. Ch. Ca. 14.—Ed.]

(dd) [Provided the mortgagee foreclosing, have notice of their liens. Semb. *infra*, 989.—Ed.]

his answers? He might have discovered his error before he had persevered in it for ten years. He negatived their right to redeem, setting up as a bar to them, the decree of foreclosure thus wrongfully obtained. It was impossible to excuse him on the ground of mistake. What motive he may have had to act in favor of the assignees, and to consider them as alone entitled to redeem, did not appear. But if a party would thus conduct himself, what was to be the consequence? It was rightly admitted, that he could not have the benefit of the decree of foreclosure; of course, it could not bind the plaintiffs, who were wilfully omitted to be made parties to it; nor could it bind the creditors claiming under the deed, and he could not be allowed to tack to his mortgage debt the costs he incurred by that proceeding, as against those who were entitled to redeem. As to so much of the suit, therefore, in which the plaintiff's right to redemption was controverted on the ground of the foreclosure, and all the evidence rendered necessary by that resistance on the part of the defendant, he (being wrong in it) ought to pay. Beyond that, however, he was not bound to pay; he was entitled to receive his costs, as to so much of the suit as was necessary for the redemption. And one of the defendants (the assignee of the bankrupt) having been examined as a witness on the part of the plaintiff, to prove the fraud of the other defendant, his Honor declared, that his costs should be borne by the plaintiff, for it was principally by this evidence that he obtained the decree in his favor, and the expence of examining this witness was not a necessary result of the former conclusion. The decree was accordingly. *Harvey v. Tobbutt*, 1 Jac. & Walk. 197. S. C. *infra*, page 994, 11th section of note there.

But costs of examining defendant as witness to be paid by mortgagor.

the equity of redemption barred. Upon this state of the case, the question was, whether B. should have made the now plaintiff party to his bill to foreclose, and whether she ought not to be let in to redeem? The Lord Keeper declared, that the case was to be judged by comparing them on both sides, and so choosing the least inconvenient; that it was extremely mischievous to the mortgagee, to make all persons that had interest parties; for by that every mortgagee, in case of several mortgages, would be continually a bailiff, and his work never at an end; but that, on the other hand, though all were not parties, yet those who were omitted would be helped at last, as they would be entitled to their principal, interest, and costs; for they might come in as to the first, second, third, or fourth mortgagees, whereas, if the plaintiff should *not* be relieved, it would be irreparable loss and ruin; and trouble and pain being less prejudicial than ruin and total loss, his Lordship over-ruled the plea.

[980]

Mortgagee's heir unnecessary party to bill of foreclosure by his devisee.

If there be tenant for life, reversion in fee, and he in reversion mortgages his estate in fee, and the mortgagee devise it, the devisee may bring his bill to foreclose against the mortgagor (e), and need not make the heir of the devisor a party; because he hath no interest in the land, it being all devised away from him; and therefore the devisee need only foreclose the mortgagor (ee).

Infant sometimes foreclosed.

It was said in the case of *Sale v. Freeland* and others, infants, on a bill to redeem a mortgage made by the father of the defendants, or be foreclosed, that the court would sometimes decree infants to be foreclosed before they came of age (g).

But now he must have day when of age, to shew cause.

But the interest of infants is so far regarded and taken care of, in the court of Chancery, that no decree to foreclose

(e) *How v. Figures*, 1 Eq. Ca. Abr. 318, pl. 5. [ante, vol. i. pages 408, 9. 423, et seq. et vide S. L. *Skipp v. Wyatt*, 1 Cox, 353; infra, 995, in *notis*, s. 11.—Ed.]

(ee) [In this case it is necessary that

the devisee have both the land and money. As to the mortgagor's devisee, see ante, p. 968, p. (L).—Ed.]

(g) *Sale v. Freeland*, 4 Vent. 351. [et vide infra, pages 985, 6, in *notis*.—Ed.]

can be made against them (*h*), without giving them a day to shew cause against it when they come of age. Thus, upon a bill brought to oblige an infant to redeem a mortgage (*i*); upon the hearing, it was decreed to an account, and the infant to pay what should be reported due, *unless cause, &c.*

The words of such decree are thus (*h*): "And this decree is to be binding to the said J. S., the infant, unless he shall within six months after he shall attain the age of twenty-one years (being served with process for that purpose) show unto the court good cause to the contrary."

If he show no cause (*l*), the decree is made absolute upon him; but when he comes of age, and shews cause within the six months (*m*), he may, upon motion, put in a new answer, and make a new defence (*n*); for it would be to no purpose to give him a day to shew cause, if the infant notwithstanding was concluded by what his guardian had done, who may have made an improper defence, or may have mistaken the nature of his case (*n*). [981]

No cause shown, decree made absolute.

This process is, by way of *subpœna*, to be served on the defendant on his coming of age, and is a judicial writ, and must be returned in term time. If the infant shews no cause, the decree is made absolute (*nn*) (*s*). Process.

(*h*) Per Lord Chan. 2 Vern. 342. *Booth v. Rich*, 1 Vern. 295. *Gundry v. Baynard*, 2 Vern. 479. *Taylor v. Philips*, 2 Ves. 23. *Cook v. Parsons*, Pre. Ch. 185. [S. C. 2 Vern. 429.—Ed.]

(*i*) *Bennet v. Edwards*, 2 Vern. 392. *Leving v. Lady Caverly*, Pre. Ch. 229.

(*k*) 3 Bac. Abr. 148.

(*l*) 3 Bac. Abr. 148.

(*m*) *Bennet v. Lee*, 2 Atk. 532.

(*n*) *Fountain v. Caine and Jeffs*, 1 P. Wms. 501. [S. C. Mos. 66. 306. 313.—Ed.] *Lady Effingham, Ex. of Lord Howard v. Sir John Napier*, 3 Bro. P. C. 301. S. C. 2 P. Wms. 401. [S. C. ante, 871, text.—Ed.]

(*nn*) [Gilb. For. Rom. 160.—Ed.]

(*R*) So an infant defendant may, before he attain twenty-one, amend his answer, and go into a new defence. *Savags v. Carroll*, 1 Ball & Bea. 548.

(*S*) Where on a decree of foreclosure an infant had a day to shew cause, and, before he was served with a subpœna, he left the kingdom, to avoid his creditors: Lord Thurlow would not allow a service of the subpœna on his Service of subpœna on infant must be personal, unless he abscond.

clerk in court to be a good service; but thought that it must be personal, or that it should be fully proved that he had left the kingdom, or had absconded to avoid the service. Afterwards, an affidavit having been made that the defendant was greatly indebted to divers persons, and that he had declared it was his intention to leave the kingdom to avoid his creditors, the Lords Commissioners, without the least hesitation, granted the motion. *Elsack v. Glagg*, 2 Dick. 764.

Service on agent or factor, good.

As to service of the subpoena when the defendant is abroad, it was in one case held, that service on a person who transacted business under a letter of attorney, from the defendant, should be deemed good service on the defendant, *Carter v. De Bruns*, 1 Dick. 39. And, in another case, it was ordered by Lord Hardwicke, that service of a subpoena to appear and answer, on the agent or factor in England of a defendant who resided in Jamaica, should be good service. In an ejectment for non-payment of rent, where the lessee resided in Jamaica, it has been lately held by the Court of King's Bench in Ireland, that the posting a copy of the declaration on a conspicuous part of the premises in the usual way, and serving another copy on the agent of the lessee who received the rents, should be deemed good service, this being a case not provided for by the statute of 15 & 16 Geo. 3. c. 37. 1 Fox & Smith, 51.

Mortgagor agrees that service on A. shall be good, nevertheless substituted service on him, refused.

In *Welkins v. Lemans*, 2 Dick. 579, a mortgagor, who had been so long out of the kingdom as not to come within the act of 5 Geo. 2, *ubi infra*, agreed before he left the kingdom, by indorsement on the mortgage deed, that in case he should not redeem by a limited time therein mentioned, that two persons therein named for the purpose, should accept a subpoena for him to appear and answer any bill that should be filed against him touching the mortgage. The plaintiff filed his bill to foreclose, and applied to serve the persons named in the said indorsement with a subpoena to appear, and that such service might be deemed good on the defendant. After standing over for consideration, Lord Thurlow refused the motion, as did Lord Kenyon, sitting for the Chancellor on a future day when the motion came on in another shape.

So service on person having general power, now disallowed.

In *Smith v. The Hibernian Mine Company*, 1 Sch. & Lef. 238, the defendant residing out of the jurisdiction had given a power of attorney to P. to act for him in the management of his affairs; the court refused to allow substitution of service of subpoena to appear and answer, on P., instead of on the defendant, Lord Redeale observing, that this question had been argued before Lord Thurlow, on these circumstances:—A person executing a mortgage, inserted a covenant, that if the mortgagee should be desirous of filing a bill of foreclosure after a certain time, service of the subpoena on a person there named, should be good service; and, on that ground, an application was made to Lord Thurlow, to substitute service, the mortgagor having gone to the East Indies. But the answer of Lord Thurlow was, "I can no more try the fact whether there is such a covenant, without having the party before me, than I can decide any other facts without the parties being before me." And Lord Redeale remembered the reasoning on the subject to be this, that the substitution of service, directed by the legislature in several cases, would be quite unnecessary, if this practice were allowed. The case, he added, was discussed with a considerable degree of attention, and he should imagine, that the cases published by Mr. Dickens were cited; but Lord Hardwicke himself

But when he comes of age, he will not be permitted to go into the account (o), nor will he be so much as entitled to re- *Infant cannot open redemption or account,*

(o) *Mellock v. Galloway*, 9 P. Wms. 332. [S. C. Dick. 65. et infra, pages 985, 6.—Ed.]

must have altered his opinion since the time when those cases were decided. Mr. Dickens was a very attentive and diligent Register, but his notes being rather loose, were not considered as of very high authority; he was constantly applied to, to know if he had any thing on such and such subjects in his notes; but if he had, the Register books were always referred to.

Lord Redesdale further remarked, that the ordinary practice of courts of equity in England when one party was out of the jurisdiction, and other parties within it, was, to charge the fact in the bill, that such a person was out of the jurisdiction, and then the court would proceed against the other parties. It could not proceed to compel the party out of the realm to do any act, but it could proceed against the other parties, and if the disposition of the property was in the power of those parties, the court might act upon it. His Lordship remembered a case which he thought was reported in Brown [*vide Williams v. Wingates*, 2 Bro. C. C. 399] where a bill was filed to sell an estate for payment of debts, and the heir at law, who was entitled to the surplus after payment of the debts, was out of the jurisdiction. The court ordered the estate to be sold for payment of the debts; adding, that the heir might file a bill to set aside the proceedings if they were erroneous: and the heir at law had a mother and sister living in England, who were in the habit of corresponding with him; yet there was no conception of substituting service. 1 Sch. & Lef. 941. *Practice when one party is out of jurisdiction.*

Where a person does not enter an appearance within the usual time after a subpoena issues, and is justly suspected to have absconded for the purpose of avoiding process, the court out of which such process issues, is authorized to fix a day for his appearance, to be inserted in the London Gazette, and published on the Lord's day in the parish church of the defendant; and a copy of the order of the court is to be posted up at some public place at the Royal Exchange in London; and, on the defendant's not appearing in the time limited, the Court may order the plaintiff's bill to be taken *pro confesso*, the defendant's estate or effects to be sequestered, and [the plaintiff's demand to be satisfied thereout. 5th Geo. 2. c. 35, s. 1. The eighth section of the act requires an affidavit that the defendant has been in the kingdom within two years before the subpoena issued; but where a person had been abroad upwards of two years, and had been outlawed, a motion was allowed upon the equity of the statute, that the defendant should appear to the subpoena within a limited time, upon an affidavit that the defendant continued abroad to avoid process. *Clarke v. Wright*, 2 Ves. Jun. 188; sed vide *Nantz v. Norris*, 5 lb. 1. *Sequestration, penalty for absconding to avoid process.*

By the Irish act for the relief of mortgagees, and for making the process in courts of equity more effectual against mortgagors who absconded and cannot be served therewith, and against persons, who, being served, refuse to appear, (7 Geo. 2. c. 14. Irish stat.) it is provided, (sec. 3) that if any person shall file a bill of foreclosure in any court of equity in Ireland, against any *Irish act for making process effectual against mortgagor's absconding.*

but may impeach decree
(T).

deem the mortgage, by paying what is reported due; but *will be only entitled to shew an error in the decree, or that it was*

person having an estate and not being resident therein; in case it shall appear, by affidavit to the court, that such defendant is out of the said kingdom, and has been so for twelve months next preceding such affidavit, it shall be lawful for the court to order, that service of a subpoena, to appear and answer, upon the steward, agent, receiver, or manager of the said defendant, and leaving a copy thereof at his last place of abode in Ireland, be deemed good service; and on the defendant refusing to appear within four terms after such service, the plaintiff shall be at liberty to proceed in his suit, to have his bill taken *pro confesso*, in the same manner as if the defendant had appeared. Sec. 8. provides a saving for infants, persons of non-sane memory, and feme covert, who are allowed two years from the time of serving the decree, after disability removed, to make their defence. The case of *Carew v. Johnston*, 2 Sch. & Lef. 280, was decided in part on this latter section. But a motion in the Court of King's Bench in Ireland on behalf of an elegit creditor, where the consor of the judgment resided in England, to substitute service of the declaration in ejectment on the agent of the consor was refused on the ground that such an order was not necessary to obtain judgment against the casual ejector. *Boardman v. Greer*, 1 Fox & Smith, 54. et vide *Jack v. Casual Ejector*, ib. 120. where the service on the land was prevented by threats.

See also the 15 & 16 Geo. 3. c. 27. Irish Statutes, which provides for the service of process where the tenant absconds. The distinction between this act and the English act 4 Geo. 2. c. 28. s. 2. is, that the former directs the mode of service only *where the tenant absconds*; whereas the latter directs the mode in *all cases* where the tenant cannot be legally served. The consequence is, that as the Irish statute does not embrace *every case* in which the tenant cannot be legally served, it is necessary to apply to the court in those cases not within the statute. But in England an application of such a nature is *never* necessary, as the statute embraces *every case*. 1 Fox & Smith, 53, n.

Vide *infra*, pages 985, 6, in the text, and second note there, for farther on the subject of sequestration. See also as to the service of the subpoena, 2 Madd. Ch. 196. 2d edit. and *Ellis v. King*, 5 Madd. Rep. 21.

[983 *]

Infant may have satisfaction against guardian for injurious decree, or set it aside for fraud.

(T) This doctrine seems confirmed by the following case of *Richmond v. Tylour*, where a decree by consent had been obtained, to the prejudice of an infant, and no day given for him to shew cause when of age. The infant having attained twenty-one, filed a bill to be relieved against the decree, and to set the same aside. Lord Macclesfield held, that where there is any fraud in carrying on or defending the cause of an infant, he may seek his satisfaction from his guardian, or he may bring his bill to be relieved, on the head of fraud; but if no fraud appear in obtaining the decree, the plaintiff will be barred thereby; on that ground he ordered the bill in the case before him to be dismissed. *Richmond v. Tylour*, 1 Dick. 38. S. C. 1 P. W. 734. 2 Eq. Abr. 516, pl. 9. But it should be added, that the infant is now always allowed a day to shew cause, *infra*, 985, 6. It is merely necessary to add, that

unjust; this was admitted as law, by the counsel on both sides, in the case of *Lyne v. Willis*, 13th May, 1730 (oo).

And where the mortgage depended upon a disputable title, *vis.* whether the ancestor of the infants had executed a power, out of which his right to mortgage arose, and so no money could be expected upon assignment of it over; the court would not decree the infants to be foreclosed until they came of age (p). No decree against infant if mortgage be on disputable title.

It is said, the proper way, in the case of an infant, is to apply for a decree, that the lands may be sold to pay the debts, and that will bind him (q); for in that case, no forfeiture will incur to him, as the surplus will be his, after the debts paid. But even then, if he be decreed to *join* in the conveyance, he must have a day after he comes of age (r); for there is no other way than this, for the infant to set forth his title, which he ought to have an opportunity of doing (v). Proper way in case of infancy is to pray sale (pp).

(oo) [S. C. 3 P. Wms. 352, n. (B), and S. L. *infra*, 983, 4, in *notis.*—Ed.]

(p) *Sale v. Freeland*, 2 Vent. 351, ante, [980, n. (g)]; et vide *Spencer v. Boyes*, 4 Ves. 370. S. C. ante, vol. i. p. 258, n. (L), where the Master of the Rolls refused to foreclose an infant till he was twenty-one, and though he held the infant bound by the covenant for further assurance, his Honor would not direct him to make good the mortgage until he attained his age.—Ed.]

(pp) [The modern way is to pray a sale or foreclosure in the alternative; see *infra*, p. 985, n. (Z).—Ed.]

(q) *Booth v. Rich*, 1 Vern. 295, ante, vol. i. 216, 17, [980, and for further instances where sale may be prayed, instead of a foreclosure, *infra*, 1014 to 1016.—Ed.]

(r) *Cook v. Parsons*, 2 Vern. 429. Pre. Ch. 184, 5. *Fountain v. Caine*, 3 P. Wms. 504.

if a decree has been obtained against an infant which is erroneous, and the error is not in the judgment of the court, but in the facts on which the judgment is founded, the manner in which the infant may proceed to investigate the decree (and which he may do during his infancy, or afterwards), is generally by original bill. *Carew v. Johnston*, 2 Sch. & Lef. 292.

(U) "One great fault of Vernon's Report of this case is, that it does not state the rule of the court clearly; for an infant may be foreclosed. You can have your decree against him. He can do nothing but shew error. He is foreclosed to all intents. You may go to market with it; and the purchaser is only liable to be over-hauled in the account," per Lord Alvanley, M. R. in *Bishop of Winchester v. Beavor*, 3 Ves. 317. Et vide S. L. *Mallack v. Galton*, *supra*, 982, 3. In *Williamson v. Gordon*, 19 Ves. 114, the bill prayed a foreclosure; and the usual decree was made for an account, declaring also that An infant may be foreclosed, subject only to error, and foreclosure no error in itself.

*But sale subject
to review when
infant of age.*

But, if the mortgagee or his alienee be satisfied (s), ~~and~~ does not require that the infant should be a party to the sale; in such case, the legal title being in the mortgagee, and the infant having a mere equity; the decree for sale, the infant being no party, may be made without a day to shew cause, but then the case will be open to investigation, when the infant attains his age (x).

*Infant plaintiff
bound by decree
in his own suit.*

But, a court of equity, where an infant is plaintiff, follows the rule of law, where it is held that he is as much bound by a judgment in his own action, as if of full age (t); and, accordingly, in a suit of equity, where an infant is plaintiff, he is as much bound, and as little privileged, as one of full

(s) *Cook v. Parsons*, 2 Vern. 429. Vide 9 Mod. 128.

(t) 2 P. Wms. 519. 3 Atk. 627.

the infants should be foreclosed, unless on being respectively served with a subpoena, they should, within six months after they attained their respective ages of twenty-one years, shew good cause to the contrary. The Master, by his report, stated what was due in the usual manner, and appointed a time and place for payment. Upon affidavit, that no one attended on behalf of the defendants, at the time and place specified, an order was made to make the decree absolute; which, as drawn up, went no further than to declare, that the decree should be absolute against such of the defendants as were adult; but was silent as to the infants. The motion was, that the clause making the decree absolute against the adults should be repeated as to the infants, with the additional clause in the original decree, giving them six months after they became of age, to shew cause. The counsel for the infants admitted, that though there was no precedent to be found of an absolute decree of foreclosure against an infant; yet, upon principle, it could not be disputed that it would be very mischievous, if an infant could be foreclosed; and the repetition of the declaration, which was necessary as against the adults, to shew that the account had been taken, seemed equally necessary with reference to the infants. Lord Eldon said, that he always understood, that infancy did not operate to prevent a decree of foreclosure; that the infant had only six months to shew cause against the decree; but he could not do that, if the decree would have been right against him had he been adult; he could shew nothing but error in the decree; and a decree of foreclosure was not error in itself. An order was then made for varying the minutes of the decree, by adding the clause above-mentioned. 19 Ves. 114.

(X) By Mr. Raithby's note to the case of *Cook v. Parsons*, the above does not appear to have been the exact point of the case. The validity of the mortgagor's will was disputed, and errors were alleged in the decree,—as that some lands, directed by the will to be let and set only, were by the decree ordered to be sold. See Raithby's Vernon, n. (2).

age (r). And this rule is general, unless gross *laches*, or fraud and collusion, appear in the *prochein amy*, then the infant might open a decree by a new bill.

Lord Hardwicke, in the case of *Gregory v. Molesworth* (u), wherein he assented to the rule last-mentioned, observed, that he knew but of one case that was an exception; that of *Lady Effingham v. Sir John Napper*, where, upon an appeal from Lord Macclesfield's decree, with regard to real estate (x), the House of Lords gave Sir John Napper leave to shew cause when he came of age, against his own decree. But it is observable, that the cause alluded to was instituted on the ground of undue influence, which is a species of fraud. However, since such decision has been made against the rule on appeal to this high jurisdiction, it may be at least questionable whether a court of equity would not be induced on slight grounds to admit an infant to shew cause against a decree in his own suit respecting his real estate; although they might decide otherwise, as to suits, with regard to his personal estate, or respecting his maintenance, education, or the like, from the mischiefs that would be incident to suffering him, by a new bill, to dispute proceedings in those respects (z).

This rule invaded on slight grounds. Semb.

[985]

(u) 3 Atk. 627.

(x) 2 P. Wms. 401. 3 Bro. P. C. 1.

(Y) But the court will take care that the infant does not make any injurious submission by his bill, and will, if necessary, when the cause is brought on, allow him to amend his bill, on paying the costs of the day. *Serie v. St. Eloy*, 2 P. Wms. 587.

(Z) The following cases have also been decided on the subject of foreclosing infants. In *Adams v. Gould*, 2 Dick. 443, Lord Bathurst, C., after much consideration, held that the defendant, an infant, who was the devisee of the equity of redemption of a copyhold estate, and decreed to join in a sale at twenty-one; was at liberty to shew cause against it when he attained the age of twenty-one; and it was ordered that the infant should be served with a subpoena for that purpose.

[985 *]
Infant decreed to convey when of age, with liberty to shew cause against it then.

In *Goodier v. Ashton*, 18 Ves. 83, the bill prayed a foreclosure against an infant mortgagor. The mortgagee proposed a sale, as more advantageous to the infant; to which proposal Mr. Wetherell, the counsel for the infant, acceded, but suggested the propriety of a reference to the Master, to inquire whether it would be for the infant's advantage. Sir Wm. Grant, M. R. said that the modern practice was to foreclose infants, and he would not make the precedent, if no instance could be found in which the case cited (*Booth v. Rick*) had been followed. The usual decree was made for a foreclosure, with

Infant may be foreclosed.

*Coverture no
impediment to
foreclosure.*

It is said, that if a woman, before her marriage, or the ancestors of a woman, mortgage lands, and the equity of redemption thereof vest in her, being a *feme covert*; upon a bill brought by a mortgagee to foreclose (y), she is liable to be absolutely foreclosed, though the procedure be during the coverture; and it is certain, that she shall have no day given

(y) *Mallack v. Galton*, 3 P. Wms. 352. [S. C. 1 Dick. 65, et ante, 982, 983.—Ed.]

P. 985
continued.

*But the most
modern practice
is a reference
(with consent
of mortgagee)
whether sale
will be benefi-
cial to infant.*

a day to shew cause.—This case, however, has not been followed; and a late decision has preferred the suggestion of Mr. Wetherell, though it may be questioned whether the practice, as stated by Sir William Grant, would have been altered, if his observations had been submitted to the attention of the Chancellor. The case of *Goodier v. Ashton*, though prior in point of time, was not reported until after the determination in the next mentioned case, viz. that of *Monday v. Monday*, 1 Ves. & Bea. 223, where Lord Eldon said, it would be too much to let an infant be foreclosed, when, if the mortgagee will consent to a sale, a surplus may be got of perhaps 4000*l.* for the benefit of the infant.

If there were no precedent, his Lordship would make one; but he was sure this had been done. The decree directed a reference to the Master, to take an account of the monies due to the several incumbrancers; and to ascertain and report their several priorities, with directions for the subsequent incumbrancers to redeem the prior, in the usual course; and, in case the mortgagee should consent to a sale, that the Master should inquire and report whether it would be for the benefit of the infant that the estate should be sold; and further directions and costs were reserved.

In a late case it was urged, that it would be for the advantage of the infant to have a sale of the term, and that therefore the court ought to direct a sale. The Master of the Rolls said, he could not go farther than the decree in *Monday v. Monday*. It would be a decree to take the usual accounts, and in case the mortgagee should come in and consent to a sale, that the Master should inquire and report whether it would be for the benefit of the infant that the estate should be sold, reserving further directions. The counsel for the mortgagee said, his client would be delayed by such a decree; and nothing definite could be done till the report was obtained. He therefore prayed a common decree of foreclosure. The Master of the Rolls:—Without the consent of the plaintiff I cannot make even such a decree as in *Monday v. Monday*. The only decree that can be made is a common decree of foreclosure. *Adkins v. Graves*, MS. Chan. Mich. 1824.

*Decree of fore-
closure, omit-
ting to give in-
fant six months
to shew cause,
erroneous.*

If the mortgagee will not consent to a reference, he may foreclose the infant; but in that case, the rule is, that the infant shall have a day to shew cause against the decree within six months after his coming of age, and a decree, omitting that provision, will be erroneous. *Savage v. Carroll*, 1 Ball & Bea. 551. When a sale is ordered, all proper parties are directed to join in the conveyance; but whether in this case, as on a foreclosure, the infant will be

to her, or her heirs, to redeem after the coverture shall be determined (A).

This distinction between the case of a *feme covert* and of an infant, as to a day to shew cause, results, I apprehend, from the different causes which give rise to their respective disabilities, and from the duration of those disabilities (x). The disability of infants is the consequence of a privilege given them by law, for their protection, founded on the natural inability which is presumed to attend persons of tender years, to act for themselves, and which determines with their minority. That of *femes covert* is an absolute incapacity, arising from their having lost, by coverture, all powers of acting for themselves; the law considering them as having voluntarily delegated their rights to their husbands, or rather, that their rights are merged in those of their husbands. The law, therefore, considers an infant as incapable of doing no binding act during a certain definite period, unless it be evidently for his own good; but from a *feme covert*, the law takes the right of acting respecting her civil concerns; and having invested the husband with the right of acting for her, leaves her liable to the consequences of his neglect, if there be no fraud. The right, therefore, to shew cause against a

Infancy and coverture distinguished in this respect.

(x) Vide Hob. 95. 1 Ves. 305. 10 Co. Rep. 43. a. 3 Atk. 712. 1 Inst. 246. 403.

allowed six months after his age of twenty-one to shew cause against the sale, and whether a decree, omitting to specify the allowance of that time, will be erroneous, has not been decided; but the case of *Savage v. Carroll*, ubi supra, may, by anticipation, afford an affirmative answer to these questions. In *Gore v. Stackpole*, 1 Dow P. C. 18. S. C. ante, 976, n. (Q), the sale was not effected till after the infant became of age; but it is presumed, that when the Master has made his report that a sale will be beneficial to the infant, and a sale has been directed accordingly, it may take place at any time during the infancy, and, if fairly proceeded in, it cannot afterwards be impeached by the infant when he arrives at the age of twenty-one years and executes the conveyance.

(A) If a *feme sole* mortgages marry, and her husband files a bill of foreclosure, the court will not compel the mortgagor to pay the money to the husband without his making some provision for his wife; or at least the wife, by an application to the court against the husband and the mortgagor, may prevent the payment of the money to the husband, unless some provision be made for her. *Bosville v. Brander*, 1 P. Wms. 458. This subject has been treated of ante, 754, *et seq.*

Feme covert mortgages entitled to provision.

decree of foreclosure, made during infancy, after the infant attains his full age, is, in equity, analogous to the privilege he hath at common law, on an action brought in relation to his inheritance, the decision upon which would be a perpetual bar to him, to pray the *parol* to demur; for, as in such case, at law, he was not permitted to go on, but for the tenderness of his years (in respect whereof the law inferred want of understanding in him) and for his benefit, that he might not be prejudiced in his estate, the court gave an interlocutory judgment, that the suit should remain over, until he attained his full age; so, in equity, though in respect of the original contract, and the right of the mortgagee to his money, and to enable him to procure it, a decree to foreclose is not stayed, yet the rights of the parties remain just as they were, until he attains his age; when, if any reason existed at the time of foreclosure, which, if urged to the court, would have been a ground for refusing it, he may take advantage of that, and have it opened (a); but the *parol* never demurred on account of coverture, for there was no natural incapacity to act in the wife, but a legal disability; she having delegated her power to another by her own act, and, thereby, made herself liable to the consequences thereof: and it would have been repugnant to every principle of equity, that the mortgagee, who lent his money under a stipulation to be repaid at a time certain, for the performance of which the land was bound, should, by the accident of coverture, have been hung up for an indefinite period of time, to be determined by the death of the husband; for this differs from the case, where husband and wife have a right of entry, which, if lost by the neglect of the husband, will be renewed in the wife after his death: as there the right to the lands is in the wife, and comes to her at a period when, by her incapacity, she cannot avail herself of her right of entry, as the means of recovering her estate, and no person is injured thereby; but in the case of a mortgage, the right to the lands, in law, is vested in the mortgagee, by the contract of the parties, for want of performance of the condition; and the court is only called upon, to enforce the contract, by closing the equity of redemption, without which

Marriage a voluntary act, which should not prejudice mortgagees.

(a) Co. Litt. 246.

the mortgagee can neither get his money, nor safely intermeddle with the land.

But, although a *feme covert* shall not have a positive day given to her, on which she may shew cause against the decree (*b*), as an infant shall, yet, I apprehend, if a bill be brought against her and her husband, during coverture, respecting her inheritance, which she claims *merely* in her right, and he afterwards dies, the right surviving to her, she may draw into question and examination, the validity of the decree obtained against her during coverture, and avoid and reverse it, if there be *just cause* so to do.

Wife, after husband's death, may examine decree made during coverture. Semb.
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Mr. Justice Wright, in the case of *Sutton v. Stone* (*c*), that he did not apprehend the Court of Chancery would point out what title the mortgagor should make on a bill to foreclose, but would decree him to make such title to the mortgagee as he was capable of doing: And thereupon, in the case in question, he directed a good title to be made by the defendant to the plaintiff, and the principal, interest, and costs on the mortgage to be paid in six months, or the defendant to stand absolutely foreclosed.

Mortgagor on foreclosure, decreed to make best title he can (a).

(*b*) Gilb. For. Rom. 161. *Evans v.* (*c*) 2 Atk. 101. [*S. C. ante*, 975 a, *Lagan*, 2 P. Wms. 430. et vide 3 P. note, (*b*).—*Ed.*]
Wms. 238.

(B) That is, if the title to the mortgage be defective, otherwise a conveyance cannot be necessary, though it be sometimes taken, see ante, vol. i. 305, n. (F). In *Pye v. Dambuz*, 3 Bro. C. C. 596; *S. C.* 3 Dick. 759, a tenant in tail made a mortgage in fee, and then, became bankrupt, his assignees were decreed to redeem, or stand foreclosed; in which latter case they were ordered to "execute proper conveyances of the mortgaged premises to the plaintiff and his heirs, of so much of the estates comprised in the indentures of lease and release, as was vested in them as assignees under the commission of bankruptcy against Benjamin Nankwell." See this case ante, vol. i. p. 194, in the text. In an *Anonymous case*, 2 Ch. Ch. 244, it was said that the court would go no further than to take away the equity of redemption, but would leave the plaintiff to such title as he had, and would not amend it; and that this was the true and ancient course, though it was added that the contrary had then of late been sometimes done. And the Lord Chancellor agreed thereto, and discharged the contempt for not delivering possession after a foreclosure of the equity of redemption. Et vide *S. C. ante*, 965, n. (*d*).

Consequences after foreclosure necessary only when mortgagor's title defective.

second mortgagee might redeem the first, after a decree ob-

a right to redeem being made a party; and the principal reason was the gross injustice in compelling a mortgagee to re-convey to a mortgagor, when it appeared by his own answer he had no right to it.

But those noticed in answer are necessary parties.

The conclusion of Lord Alvanley's judgment was as follows:—"Where there is only one single incumbrancer, what occasion is there to go out of the common rule? The usual and common practice, almost without exception, is to make all incumbrancers parties. If I lay down that it is absolutely necessary, I arm a man with a shield to ward off a foreclosure. But the question is, whether it is not proper in this case? I think it would be too much to refuse it, where there is no affectation of delay that I can see. I do not think the general point so clear as to determine it upon this case; I hope the court is not bound to insist upon all incumbrancers being parties; but I am perfectly satisfied that in this case it is by much the least evil to order the cause to stand over till this single incumbrancer is made a party," which was accordingly done. *Bp. of Winchester v. Beaver*, 3 Ves. 317.

Observations on preceding case.

The conclusion from this case is, that the general practice here spoken of by Lord Alvanley, and adopted by Mr. Maddocks, is not supported by any direct authority, and it is observable, that Lord Alvanley in the above case, most cautiously refrained from stating that every incumbrancer not appearing on the records was a necessary party to a bill of foreclosure. The case, therefore, rests upon principle, and it is scarcely requisite to remark, that of those incumbrancers whose liens appear by the answer, the mortgagee will thereby acquire notice, and as to them he must move for time to amend his bill, by making them defendants to his suit. *Et vide Palk v. Clinton*, 18 Ves. 58, where it was made a question whether *all* incumbrances were necessary parties to a bill of foreclosure, but the point was left undecided. See also ante, p. 951, where it is laid down that the mortgagee will not be obliged to account for rents and profits received, or which he might have received as against other incumbrancers unless he have notice of their claims, which would involve a singular anomaly, if it be law that he has to make them parties to his bill of foreclosure, whether he have notice of their incumbrances or not.

Of incumbrancers becoming such before mortgage, or after filing of bill.

Incumbrancers before the making of the mortgage will of course have the same lien against the estate after foreclosure as they had before; and it seems clear, that as to incumbrancers becoming such after the bill of foreclosure has been filed, they will be bound by the decree, and need not be made parties, whether the mortgagee have notice of them or not, for an alienation pending a suit is void, or rather voidable. *Walker v. Smallwood*, Amb. 676. *Gaskill v. Durdin*, 2 Ball & Bea. 167. *S. C.* and *P.* ante, 548, in note, and *Moore v. Manumau*, 1 Ball & Bea. 309. If, therefore, after a bill filed by the first mortgagee to foreclose, the mortgagor confesses a judgment, executes a second mortgage, or assigns the equity of redemption, the plaintiff mortgagee need not make the creditor, incumbrancer, or assignee parties, for they will be bound by the suit; and a purchaser who took an objection to a title, that two mortgagees (who became such after the bill filed) were made no parties to the foreclosure, was condemned with costs. See *Bp. of Winchester v. Paine*, 11 Ves. 199. *S. C.* ante, vol. i. 548, n. (R), over-ruling *Cripp v. Heath*, 7 Vin. Abr. 52, pl. 2, to the con-

tained by him to foreclose, although the first mortgagee had no notice of the second mortgage before the decree.

But the first mortgagee shall be allowed all his expences out of pocket. Thus, where L., a second mortgagee (h), came to redeem H., who had been at great expences in law-suits to foreclose the mortgagor, and otherwise, in relation to the estate, the court ordered that his costs should not be

First mortgagee redeemed by second allowed all expences, and not confined to taxed costs (v).

(h) *Lomax v. Hyde*, 2 Vern. 185.

trary. See also 3 Ves. 315, and *Garth v. Ward*, 2 Atk. 174. *Style v. Martin*, 1 Ch. Ca. 120, and *Metcalf v. Pulvertoft*, 2 Ves. & Bea. 207, where it was expressly acknowledged by the Court, that a judgment confessed after a bill of foreclosure will be ineffectual against the plaintiff. See vide what is said by Lord Eldon in *Daly v. Kelly*, 4 Dow. P. C. 433, that if land be aliened pending a suit in equity about it, though this will not prejudice the plaintiff, the alienee ought to be brought before the Court. But his Lordship added, "if there are vexatious alienations pending a suit, the Court will restrain them," ib. 440.

(D) A reference was made to this place from a former page, ante, vol. i. 337, n. (8), for the modern decisions on the subject of costs. It is therefore proposed to run through the leading authorities on that head here, though they may not be exactly relevant to the doctrine under consideration.

In the first place it may be observed, that a mortgagee will be allowed the costs of procuring letters of administration to an Incumbrancer; whom the will of the mortgagor has made a necessary party to the bill of foreclosure. Thus in *Hunt v. Fownes*, 9 Ves. 70, a bill of foreclosure had been filed by a mortgagee in fee against a devisee for life and a devisee in remainder under the will of the mortgagor, the heir at law, and an annuitant of 20l. under the will. In 1779, the usual decree nisi was made; and in 1787 the decree was made absolute against the devisee for life only. The mortgagee had been in possession from 1775. In 1792, the devisees of the mortgagor conveyed to other persons; and bills of revivor and supplement were filed. The annuitant being dead, an administration to her, as a necessary party, the annuity being in arrear at her death, was procured by the son and heir of the mortgagee to a person of his nomination; and upon the master's refusal, under the decree upon the supplemental bill, to allow the costs of that administration, a petition was presented by the heir of the mortgagee and allowed. The Master of the Rolls observing, that the expense was absolutely necessary, and the demand, if there was no practice against it, seemed reasonable; the original mortgagor having, by parceling out the equity of redemption, occasioned the necessity of it. 9 Ves. 71.

Mortgagee allowed costs of administration to an annuitant under mortgagor's will, to whom arrears were due.

3d. We have seen, that if a mortgagee settles his estate on a variety of trusts, the costs of making all the persons claiming under the settlement, parties, as well *certainis que trust* as trustees, must be borne by the mortgagor, ante, vol. i. 402, n. (K). The costs also of tracing the mortgagee's representative, whose concurrence is requisite in a reconveyance of the estate on a bill of re-

Mortgagor must pay costs of parties, made necessary by lawful acts of mortgagees.

taxed, as in an adverse suit, but that he should be allowed all his costs and expences, as was done in the case of a

demption, must be borne by the mortgagor. *Smith v. Bicknell*, 3 Ves. & Bea. 51. But it has been inferred from the case of *Skipper v. Wyatt*, 1 Cox, 353, et infra, that the mortgagor will not be liable to pay the costs of costs *que trust* under the mortgagee's settlement where their claims are adverse to each other. 1 Jac. & Walk. 266, n. (a), that is, it is presumed, the costs of settling those claims.

Purchasers of expectant heirs allowed costs.

3d. In conveyances by expectant heirs, which have been set aside on the ground of inadequate consideration, or undue advantage, the purchasers have nevertheless been considered as mortgagees, and held entitled to costs. See *Twissleton v. Griffith*, 1 P. Wms. 310. *Guyane v. Heaton*, 1 Bro. C. C. 1. *Spencer v. Chase*, 9 Mod. 39. *Peacock v. Evans*, 16 Ves. 512. *Gowland v. De Faria*, 17 ib. 20, and *Bowes v. Heaps*, 3 Ves. & Bea. 117. But Lord Hardwicke in one case under similar circumstances, refused to give costs (*Lawley v. Hooper*, 3 Atk. 278); and in another, gave costs against the pseudo-purchaser. *Barnardiston v. Lingood*, 3 Atk. 133.

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So of elegit creditor.

4th. In *Owen v. Griffiths*, Amb. 540, a decree at the Rolls directing a creditor in possession under an elegit (who had been reported over-paid) to pay costs, was reversed. It does not appear, however, from the report, that he ultimately obtained his costs.

Mortgagor liable to costs, though he pay money into court.

5th. Where a party purchased premises, charged as a collateral security for an outstanding bond, and there being several claimants, he paid only part of the purchase-money, and executed a mortgage for the residue to the amount of such charge, and afterwards filed a bill as mortgagor against the obligees and the trustees (his vendors) to have the premises reconveyed to him, and a declaration of the court as to the parties entitled to receive the mortgage money; the court held, that it could, in effect, only be considered as a bill by a mortgagor to redeem, and that he must pay the costs, although he had paid the money into court. *Drew v. Harman* and others, 5 Price, 319. *S. C. ante*, vol. i. 402, n. (K).

6th. It may be inferred from the case of *Corder v. Morgan*, cited ante, vol. i. p. 19, that where a mortgagee has absolute powers of sale, if the purchaser shall refuse to complete his contract by reason of the mortgagor not concurring in it, and a bill be filed against him by the mortgagee for specific performance, it will be decreed against him with costs.

Costs of ejectment, not allowed if no notice taken thereof, in bill.

7th. On a bill of foreclosure, the master will in general be directed to take into the account the costs incurred by the mortgagee in proceedings at law in ejectment, and such costs will be allowed. See infra, 1103. But if no mention be made of any actions at law in the bill or prayer, an account of the costs at law will not be ordered. Thus, on a motion under the statute 7 Geo. 3. c. 20, for a reference to the Master on a bill of foreclosure, the Vice-Chancellor said, that as no mention of any action at law, or costs incurred was made in the bill, he could not order the Master to take such costs into the account. But his Honor would allow the plaintiff to amend his bill in that respect, and permitted the motion to stand over until the bill was amended. *Millard v. Megor*, 9 Madd. Rep. 433.

8th. It

solicitor, who laid out and disbursed money for his client; and farther, that the profits of the estate in question should be

8th. It has recently been decided, that the costs of the committee of a lunatic mortgagee which may be incurred in enabling him to reconvey to the mortgagor, under the statute 4 Geo. 2. c. 10, (including the costs of the reference,) are to be paid out of the lunatic's estate, whether the application be made by the mortgagor or by the committee, which latter is the most usual course. *Richards, Ex parte*, 1 Jac. & Walk. 264; see also *S. L. Bridges, Ex parte*, Cowp. Rep. 290. But we have seen, (ante, vol. i. 207, *in notis*,) that an infant trustee or mortgagee within the statute of Anne, will be allowed all reasonable costs incurred in executing the conveyance. The following are Lord Eldon's sentiments on this subject:—Where the costs of a trustee are directed to be taxed, that means as between party and party; not in the larger way. But, where a trustee in the fair execution of his trusts has expended money by reasonably and properly taking opinions, and procuring directions that are necessary for the due execution of his trust, he is entitled not only to his costs but also to his charges and expences under the head of just allowances. Some of the Masters think, that as these charges cannot come under the head of costs, they cannot be given under just allowances. With regard to an infant this requires great consideration; for, as the infant himself cannot incur charges and expences, and if the costs cannot be claimed under just allowances, and the next friend is to be at the whole expence, persons will deliberate before they accept that office. *Fearn v. Young*, 10 Ves. 184. In the subsequent case of *Cant, Ex parte*, ib. 554, the same noble Lord, in ordering an infant mortgagee to convey, intimated his wish, that the Master should look into the bill with an anxiety to disallow every thing that was not necessary; for instance, a brief to counsel to consent for an infant; to which no attention could be paid.

Distinctions on costs as to lunatics and infant mortgagees.

9th. Under a bill by the first mortgagee, a sale having been directed with the consent of the second and third mortgagees, and the produce not being sufficient to pay them all, a question was made, whether the costs should be paid in the first place. The Lord Chancellor said, the costs must be paid in the first instance, for that in the case of a decree under a bill by creditors for a sale, the mortgagees were untouched by the decree, but if they came in, and consented to a sale they were bound. The first mortgagee might have foreclosed; and the third mortgagee could have prevented the effect of that by redemption only. The costs were accordingly ordered to be taxed in the first instance. *Kenebel v. Scrifflon*, 13 Ves. 378.

Sale directed with consent of second and third mortgagees, costs to be paid first.

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10th. The costs to which a mortgagee is entitled are not taxed costs, but such as are allowed between attorney and client; and it should appear from the case of *Ramsden v. Langley*, 2 Vern. 536, *S. C.* ante, p. 956, that if at law the mortgagee has been decreed taxed costs only, a court of equity will help him to his full costs. But

Mortgagee entitled to full, not taxed costs.

11th. Though a mortgagee is *prima facie* entitled to full costs, he may be deprived of them by his own positive misconduct. *Lefts v. Swift*, 2 Sch. & Lef. 657. It is true, that the owner coming to deliver the estate from that incumbrance he himself placed upon it, the person having the pledge is not to be put to

But he may be deprived of them by oppression and delay.

applied, in the first place, to pay and satisfy what was due for

expence with regard to that ; and so long as he acts reasonably as mortgagee, to that extent he ought to be, and indeed will be, indemnified. But that principle does not go to a case where a mortgagee, through his improper conduct, occasions a great deal of delay and expensive litigation. If therefore a mortgagee onerates the pledge with costs incurred by an unjust defence, he will be ordered to pay the same. This was in effect decided by Lord Keeper Littleton, in *Bacon v. Bacon*, (Toth. 231. 138, edit. 1829,) afterwards more explicitly by Lord Hardwicke, in *Mocatto v. Murgatroyd*, 1 P. Wms. 395, and finally by Lord Eldon, in *Detillin v. Gale*, 7 Ves. 583, in which case the latter learned Judge said it was a very clear moral proposition, that the mortgagee ought to pay all costs his unnecessary and oppressive dealings had occasioned.

Solicitor taking mortgage from client without statement of account decreed to pay costs.

In *Detillin v. Gale*, ubi supra, the mortgagor's solicitor had taken a mortgage from his client for the amount of his bill without any settlement of the accounts between them. An inquiry having been directed as to what was due to the defendant (the solicitor) upon his securities and otherwise, great delay and expensive litigation was occasioned by his conduct before any account could be procured from him ; and, finally, his demand was reduced to more than one-sixth of the amount originally stated. The plaintiff (who was the mortgagor) pressed for a general account against him, with rests, and also for costs. For the defendant it was insisted, that there was no instance of making a mortgagee pay costs. But the Lord Chancellor said, that was not of necessity ; and the principle, though generally true, did not apply to such a case as this, where the expence of the suit was not incurred by the mortgagor in attempting to deliver his estate from a demand admitted to be just ; on the contrary, the great expence of the suit was incurred in a successful endeavour of the mortgagor to prove, what he had established, that the defendant charged him with a great deal more than he ought ; and, the court having taken off upwards of one-sixth of his bill, there was no doubt his Lordship was acting equitably, (following the principle of the legislature,) by saying, that as to so much of the suit as related to that bill the mortgagee should pay the costs. He was under an obligation to bring into the Master's Office clear accounts capable of being clearly vouched, for he was not a mere mortgagee, but become so in consequence of his transactions as agent. Was he then to charge the estate with all the expence attending a useless and unnecessary litigation in the Master's Office? Certainly not ; but it was a very different consideration, whether, being a mortgagee, he was to pay the costs of the mortgagor : if any, it was to be considered, what costs ; for the suit went to other accounts with other incumbrancers, and to points, as to which to a certain extent he must have had costs. Lord Eldon then stated the general principles above mentioned, and declared, that it would be a disgrace to the court to allow the defendant his costs farther down than to the time of his answer ; 7 Ves. 586.

Settled that mortgagee may be decreed to pay costs.

In a subsequent case, (*Trecothick, ats. ————*, 2 Ves. & Bea. 181,) it was insisted, that there was no instance of refusing a mortgagee his costs : the general rule which depended on a principle of public policy, with a view of encouraging loans on mortgage, requiring the mortgagor always to be ready

such costs, charges, and disbursements, before it was applied

with a tender. The Lord Chancellor, however, said, there were exceptions to this rule, as in *Detiffin v. Gale*, ubi supra, where he himself had refused a mortgagee costs. In a case before Lord Thurlow (*Shuttleworth v. Louth*, mentioned also, 7 Ves. 586), Lord Lonsdale had filed a bill of foreclosure, meaning, not that the estate should be redeemed, but to inflict a Chancery suit on the defendant, who moved for a reference to the Master to inquire what was due; having found the means of payment, the plaintiff moved to dismiss his bill. After that conduct, Lord Thurlow thought the mortgagee entitled to costs; but Lord Eldon, in the above case of *Trecothick*, ats. —, said, that he would have refused costs in such a case; as admitting the policy that had been mentioned, of holding the mortgagor to a tender, yet if the conduct of the mortgagee shewed, that though repeated tenders should be made he would not act upon them, the doctrine of law should be applied to that case. 2 Ves. & Bea. 181.

If a mortgagee resists redemption merely for the sake of opposing the mortgagor, when a clear equity to redeem can be proved against him;—as if he contend, that the deed represented to be a mortgage, was an absolute conveyance, when, in fact, it is accompanied with a defeasance in a separate deed; or if he object to being redeemed on the ground of length of time, when twelve years only have elapsed since his entry into possession, especially if the person entitled to the equity of redemption labour under a disability all that time;—he will be decreed to pay the expenses which this resistance against his own knowledge may have engendered, *Baker v. Wind*, 1 Ves. 651. So, in *Broughton v. Davis*, 1 Price, 324, the court of Exchequer gave costs for the crown against an equitable mortgagee, who stood on a point which he could not sustain. And in a late case, where a mortgagee resisted the mortgagor's right to redeem, on the ground of a decree of foreclosure, which decree the mortgagee had collusively obtained, he was decreed to pay so much of the costs as were incurred by his controverting the right to redeem, and for all the evidence rendered necessary by that resistance. Beyond that, however, the court said, he was not bound to pay; and it was decreed that he should receive his costs as to so much of the suit as was necessary for the redemption, *Harvey v. Tebbutt*, 1 Jac. & Walk. 202. S. C. ante, 979, n. Where a mortgagee filed a bill against the mortgagor, to make him account as bailiff, and, upon an issue at law, it was found that the plaintiff was a mortgagee; upon which he amended his bill, or rather converted it into a bill of foreclosure; he was decreed forthwith to pay the costs of the issue, the costs of the present application, and all other costs which the defendant had sustained beyond what he would have been put to if the bill had been originally a bill of foreclosure. *Smith v. Smith*, Coop. Ch. Ca. 141. Bell's Supp. 1 Ves. sen. 88. The question as to what costs a mortgagee shall receive who has created the necessity of a suit, arose also in *Quarrell v. Beckford*, 1 Madd. Rep. 286; but the case went off on another ground.

Mortgagee disallowed costs where he resists redemption without ground, or pursues wrong remedy.

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not in point at all.

It should, however, be remembered, that if a mortgagee insist upon a point which is doubtful, it will not deprive him of his costs, *Perry v. Barker*, 13 Ves. 805; for costs do not follow the event of the suit, where a fair ques-
Sed contra if case be doubtful, or issue directed.

Decree of foreclosure impeachable for fraud, though signed and enrolled.

And a decree to foreclose, though made absolute, signed and inrolled, is no plea to a suit to redeem, if surreptitiously procured (i). Thus, where a plaintiff brought a bill to redeem, setting forth, that his late father being seised in fee of lands in P. of 50*l.* *per annum*, made a mortgage thereof to I. S., and that the defendant desired the plaintiff's father would consent

(i) *Lloyd v. Mansell*, 2 P. Wms. 74. [See two cases of fraud, ante, 976 and 978, n. (Q).—Ed.]

Mortgagee selling under general order in bankruptcy, must pay expenses of sale.

Finally, it is observable, that in *Bowles v. Perring*, 2 Brod. & Bing. 457, where the mortgagee applied to the commissioners of a bankrupt mortgagor, at a general meeting for a sale of the mortgaged premises under Lord Loughborough's order, 8th March, 1794, and the sale was directed accordingly; at which sale the mortgagee became the purchaser, the court of Common Pleas was clearly of opinion, that the mortgagee was bound to pay the expenses of the sale, including advertisements and the solicitor's charges under the commission, he having attended the sale, prepared the conveyance, and procured its execution. Burrough, J. observing, that the sale was for the benefit of the defendant [the mortgagee] as it enabled him, if the estate turned out to be insufficient to pay the mortgage-money, to prove the difference under the commission; that this mode of proceeding was more expeditious and beneficial than foreclosure, and that, at all events, the defendant, having adopted it, was bound to take it with all its incidents. It was then insisted, that the defendant was not liable to pay the fees of the commissioners amounting to 20*l.* As it did not appear that the meeting was held at the defendant's request, or for his business especially, Park and Burrough, Justices, (who said they had been commissioners of bankrupt for many years) declared they entertained no doubt that the defendant was, under the finding of the jury, (which precluded the court from entering into the quantum) liable to reimburse the plaintiff these charges also, as every meeting of the commissioners, in which the accounts of an individual are examined for his own benefit, constituted a special meeting as to that individual, although other business might be transacted the same day. But Dallas, C. J. and Richardson, J. expressing a wish that the fact should be ascertained, whether the meeting in question was or was not at the express instance of the defendant, and for his special business; the plaintiff, in order to end the cause, consented to abandon any charge for fees to the commissioners beyond what they would have been entitled to on a general meeting, and a verdict was entered accordingly. 2 Brod. & Bing, 460. S. C. 5 J. B. Moore, 290.

The subject of this note has been previously hinted at in various pages. See vol. I. p. 187. 336. Et ante, 977. 903. 1037, where a mortgagee was denied the costs which a mortgagor occasioned by a cross bill in the cause. As to costs on equitable mortgages and in bankruptcy, see Chap. XXIII. post, and *Pilkington v. Wignall*, 2 Madd. Rep. 340, where A. filed a bill of redemption without title, and then purchased a right to redeem, but his bill was dismissed with full costs. S. P. *Tonkin v. Lethbridge*, Coop. 43.

that this mortgage should be assigned to the defendant, who would help the plaintiff's father to a place, and be willing to take his interest out of the profits of the place; that thereupon this mortgage was, by the plaintiff's father's consent, assigned to the defendant, who never helped the plaintiff's father to any place; but instead thereof the defendant, the next term after the mortgage was forfeited, brought an ejectment against the plaintiff's father, and turned him out of possession; and the term next following, the defendant brought a bill against the plaintiff's father, who put in an answer to the bill, and then the defendant got a common bailiff, one of a scandalous character, to make an affidavit, that the plaintiff's father had left his habitation, and (as he believed and was credibly informed) was gone beyond sea; upon which affidavit the now defendant got an order, that service of the then defendant's clerk in court might be good service; whereas the plaintiff's father was then living, and publicly appeared in the next county with his wife's relations; but upon this false affidavit, and order made thereupon, the cause was heard *ex parte*, and the report made *ex parte*, and confirmed absolutely; by which means the plaintiff's father became absolutely foreclosed, although the estate was of much greater value than the mortgage.

The defendant pleaded this decree and report (*k*), and both made absolute, signed and inrolled. *Et per curiam*, all these circumstances of fraud ought to be answered; which the defendant has been so far from doing, that he only pleads that decree and report as a bar, which the plaintiff seeks to set aside; and the decree being signed and inrolled, the plaintiff has no other remedy; and if these matters of fraud laid in the bill are true, it is most reasonable that the decree should be set aside, and the plea was over-ruled.

It was objected, in the above case, that according to the rule then laid down, a decree might be set aside by an original bill (*m*); but the court replied, that such a gross fraud as this was an abuse of the court, and sufficient to set any decree aside.

(*k*) *Lloyd v. Minnells*, 2 P. Wms. 74.

(*m*) *Ibid*.

Decree of foreclosure nisi enlarged three times (E).

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The time for payment, limited on a decree for foreclosure, may be renewed several times upon special circumstances. Thus, where a decree for foreclosure was made, and six months time given thereby for redeeming, according to the usual form of those decrees (n), the six months being near expiring, the mortgagor obtained an order for enlarging the same for six months more. After this, he produced another order for enlarging the time six months farther, but it was made part of that order that he should sign the Register's book, and thereby agree not to ask for a farther enlargement. He signed the Register's book for that purpose accordingly. Notwithstanding which, on a farther motion, that the time might be enlarged six months more upon this circumstance, that the estate was of greater value than the incumbrance upon it amounted to, the Lord Chancellor was of opinion, that, upon that ground, the motion was reasonable; but made it part of his order, that this last time should be peremptory (F).

(n) *Anon.* Barn. Rep. 221. S. C. effect of extending time for redemption, on interest, see ante, 913.—*Ed.*]
2 Eq. Ca. Abr. 605, pl. 37. [For the

Cases on enlarging time.
[998*]

(E) So if the mortgagee, on a bill of foreclosure, refuse to produce the title-deeds, it seems that this also will be a good reason for enlarging the time of redemption. *Anon.* Mose. 246. Et vide *Stokes v. Robson*, 3 Ves. & Bea. 51. S. C. 19 Ves. 385. Et ante, page 959, note (U), where a motion was made for further time to redeem a mortgage, and that it should stand as a security for what was *bonâ fide* advanced, but forfeited as to what was won at play. Lord Hardwicke said, as the mortgagor, in a former cause where he might have done it, did not insist on a redemption, the foreclosure could not be regularly kept open, but on the whole circumstances his Lordship allowed three months further for redemption. *Fleetwood v. Janssen*, 2 Atk. 466. For the modern cases on this head, see the following note; and that securities for money won at play are void, see *Lowe v. Waller*, 2 Doug. 743. 9 Ann. c. 14. *as. infra.* Note, that the motion to enlarge the time for foreclosing is not a motion of course, although the interest be paid up, and the costs paid for, *non constat* that the security may be sufficiently ample. *Quarles v. Knight*, 8 Price, 630.

Fourth order for enlarging time granted, though preceding order was peremptory;

(F) In a late case a fourth order was made for the enlargement of time to redeem on a decree nisi, notwithstanding the preceding order was peremptory. The mortgagor's solicitor made an affidavit that the estate had been sold, but owing to some objections to the title, the contracts were not executed, but that the objections were satisfactorily answered, and that he verily believed he should be able to get such sales completed within the space of three months. The Vice Chancellor remarked, that it required a strong

case to induce the court to make a fourth order enlarging the time for the payment of mortgage money decreed to be paid. If the defendant had done all he could to obtain the money, and had been baffled in his purpose by unexpected delays, and there appeared a strong probability of the money being raisable within three months, the court would feel disposed to enlarge the time. It was sworn that the objections to the title were satisfactorily answered, and the solicitor also swore, that he verily believed the sales would be completed within three months. The last order did certainly purport to be a peremptory order. But his Honor thought, the court had sometimes in these cases given further time, notwithstanding that expression whereupon an order for three months further time, on the usual terms, was granted. *Edwards v. Cunkife*, 1 Madd. Rep. 289. The mortgage-money, in this case, was 7000*l.*, and the estate was calculated to be worth 15,000*l.* It was afterwards sold by auction, between the dates of the second and third orders, for 9000*l.*—So tender indeed is the Court of Chancery in concluding the equity of redemption that where, pending exceptions, the time appointed for payment of principal and interest had elapsed, the Vice Chancellor said, the defendants (the mortgagors), should regularly have applied to the court to have the time appointed for payment of the principal and interest enlarged, until the exceptions should be disposed of. But he could not for that slip on their part conclude their right of redemption. His Honor therefore referred back to the Master to compute subsequent interest, and to appoint a new time of payment. *Renoir v. Cooper*, 1 Sim. & Stu. 365. It was said in *Jewop v. King*, 2 Brod. & Bing. 97, that the slightest ground will induce a court of equity to extend the time of sale in a foreclosure cause.

and the time had elapsed.

Where an order has been made under the 7th Geo. 2. c. 20. s. 2., a further order may be made to enlarge the time to redeem; for the latter words of the act put it exactly in the same situation as if the cause had been brought to a hearing; and notwithstanding Mr. Cooper's objection that the court had no authority under the statute to enlarge the time, the object of the statute being to relieve mortgagors, who had their money ready, from the necessity of submitting to the delay and expence of a suit; yet the Lord Chancellor thought that one of the intents and purposes of the statute must have been to give the court this jurisdiction, and refused the time prayed, which was eight months and upwards, but ordered the time to be enlarged to the first day of the ensuing Hilary Term, a period of about six months. *Wackerell v. Delight*, 9 Ves. 36. *S. C. ante*, vol. i. 170, note (T). 1 Turn. & Ven. 796, last edit.

Time may be enlarged under 7 Geo. 2.

As to the stat. 7 Geo. 2. it is further observable that the concurrence of a bankrupt is necessary to an application to the court under this statute by the assignees. A mortgagee had filed a bill of foreclosure. The mortgagor having become bankrupt, his assignees made the usual application under the 7th Geo. 2. c. 20. in order that the sum due on the mortgage might be ascertained and paid off. To this application it was objected, that it could not be made except on the behalf of all who were interested in the equity of redemption; that if the cause had been brought to a hearing the decree would have reserved the power of redemption to the bankrupt as well as to his assignees; and, therefore that the motion could not be granted, when made on behalf of the assignees alone. The Vice Chancellor was of opinion that he could not

Bankrupt's consent necessary to application of this statute.

Under pressing circumstances time enlarged, though decree signed and inrolled.

And where it appeared that, notwithstanding a continued endeavour on the part of the mortgagor, to sell the lands mortgaged, and pay what was due, he was prevented by inevitable necessity, and no wilful default could be alleged in him, as where a rebellion was subsisting (o); the court enlarged the time as to the performance of such a decree, *notwithstanding it has been signed and inrolled.*

Foreclosure never opened for volunteer.

A decree for foreclosure will not be opened in favor of a mere volunteer (p); for a mortgagee is a purchaser, and so hath equal equity with a volunteer, and an absolute estate, in law, by the foreclosure.

No foreclosure on Welch mortgage.

It has been observed, that in Welch mortgages, where, by special agreement, profits are to be set against interest, there can be no foreclosure: but on tendering principal and interest the mortgagor may come into Chancery for redemption at any

(o) 1 Ch. Ca. 63, 4. *Cocker v. Bea-* (p) *Rosservick v. Barton*, ante, 972,
vit, 1 Ch. Rep. 255. *Immoord v. Clay-* S. C. 1 Eq. Ca. Abr. 317, pl. 4.
pool, 1 Ch. Rep. 139.

grant the motion. The act of parliament enabled the court to take this course of proceeding only when the application was made by the defendant or defendants having a right to redeem the mortgaged premises. The bankrupt had a right to redeem them. The decree at the hearing would give him as well as his assignees, the power of redemption; and, therefore the application could not be made unless he concurred in it or consented to it. *Garth v. Thomas*, 2 Sim. & Stu. 186.

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Second order made conditionally.

If a mortgagor dispute the right of the mortgagee to the money, but the mortgagee nevertheless obtains a decree of foreclosure, the court will not upon motion, suspend the execution of the decree until six months after an appeal shall be heard, but will allow the mortgagor six months from the time fixed by the Master's report, upon his consenting to the appointment of a receiver, and paying the plaintiff the interest due from the time of filing the bill, and the costs, upon his undertaking to repay if the decree should be reversed. *Monkhouse v. Corporation of Bedford*, 17 Ves. 380.

Origin of rule; which prevails only in England; and its adoption regretted.

The origin of this doctrine, allowing an enlargement of the time, is to be attributed to those cases in which relief was given originally with reference to non-payment of money at the specified time. The court of Chancery proceeded on this erroneous notion, that by the payment of interest, the party was put in just the same state as if the principal had been paid at the time stipulated; but the failure of payment at the time may be attended with mis-

time (g). The reason is, because, in such cases, there is nothing for the rule laid down by the court in analogy to the statute of limitations, to operate upon, for there is no forfeiture, and it is on forfeiture that the rule begins to attach. And though, in such case, the mortgagee becomes in the nature of a perpetual bailiff, to the mortgagor, which is an additional objection to opening long accounts, yet that does not hold, where the mortgagee voluntarily takes the estate subject to a perpetual account, because he ought not to be relieved from his own contract and agreement.

A foreclosure, obtained by a first mortgagee against a second mortgagee, will be opened in favor of such second mortgagee, if the land he afterwards devised by the first mortgagee to the mortgagor; for although the second mortgagee, having accepted the lands already mortgaged for his security, must hold them, subject to the same conditions, to which they are liable in the hands of the mortgagor (he being able to con-

First mortgagee forecloses second, then devises to mortgagor. Second mortgagee may as against mortgagor, open foreclosure and redeem.

(g) 1 Ves. 406. *Howell v. Price*, ante, [vol. i. 373 and 374.—Ed.]

chievous consequences that never can be cured, in a rational sense, by a subsequent payment with the addition of interest, per Lord Eldon, in *Reynolds v. Pitt*, 19 Ves. 140. The same noble Lord has regretted that the court ever varied the agreements of the parties in these cases. *Anon.* MS. 2 Madd. Ch. 492. During the Usurpation, it was recommended that a limit should be given for mortgagors to redeem, but this recommendation has never been adopted. See 30 Parl. Hist. 206. In Ireland and Scotland this rule is different, or rather does not exist; for the courts in these countries never interfere in the manner in which courts of equity do in England, to protect the borrower against the immediate payment of money vested in land. On this account, money is, in those countries, more frequently lent on mortgage than in England. 2 Madd. Ch. 492, n.

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continued.

But it is essential to add, that the time will not be enlarged on a bill of redemption as on a bill of foreclosure. *Novoselski v. Wakefield*, 17 Ves. 417. The natural decree on a bill of redemption is, that the second mortgagee shall redeem the first, and that the mortgagor shall redeem him or stand foreclosed, per Lord Thurlow in *Fell v. Brown*, 2 Bro. C. C. 278, approved by Sir William Grant, M. R. in *Palk v. Clifton*, 12 Ves. 59, and acted on in *Sutherland v. Northmore*, 1 Dick. 58, and in *Aynsley v. Reed*, ib. 251. It is now settled, that if a bill filed by a mortgagor for redemption, be dismissed, the money not being paid at the time, that will operate as, and be equivalent to, a decree of foreclosure. *Winchester v. Paine*, 11 Ves. 109. See, as to this, ante, 968, note (K).

Time not enlarged on bill to redeem, as on bill to foreclose.

vey only what he has, which is an estate subject to foreclosure, unless redeemed either by him, or those claiming under him); yet, as between the mortgagor and mortgagee, the debt continuing due, and the charge on the estate valid, it is capable of re-attaching upon the lands, if they come again into the hands of the mortgagor, or those of a subsequent claimant under him; and the mortgage deed may be made use of, as a kind of equitable estoppel, to any plea the mortgagor may put in, in answer to this claim.

Lessor estopped from disputing lease.

It in some degree resembles the case, where a man makes a lease, by indenture, of D., in which he has no interest, and then purchases D. in fee, and afterwards bargains and sells it to A. and his heirs (r); in which case, A. will take subject to the lease (s). So, where a trust is broken, and then something done which is a full bar to the *cestui que trust*; yet the land coming afterwards to the trustee's hands, he will be decreed to convey to the *cestui que trust*. Thus where there was a first and second mortgage made of the same estate, the first mortgagee brought a bill against the second to compel him to redeem or to be foreclosed, and foreclosed him accordingly (t); afterwards, the first mortgagee, by his will, devised the said premises to the mortgagor; whereupon the second mortgagee brought a new bill, to set aside the first mortgage, and to be let into a satisfaction of his money; to which the defendant pleaded the former suit, and decree of foreclosure: but the court ordered the defendant to answer the bill.

[1001]

Mortgagee may foreclose and proceed on bond, or collateral security for deficiency (u).

A mortgagee may, after a foreclosure, proceed on his bond or other collateral securities. Thus, where E. made a mortgage of some leasehold estates to R. for 1200*l.* and afterwards sold the premises to W. for 1500*l.* W. paid off parts of the

(r) Salk. 276.

(t) *Cook v. Sadler*, 2 Vern. 355. S. C.

(s) *Lord Canmore's case*, cited 1 Vern. 1 Eq. Ca. Abr. 317, pl. 2.—*Ed.*]

148.

(G) See S. L. ante, vol. i. page 204, and post, page 1404; and if the mortgagee have no collateral security, it is presumed that an action of *indebitatus assumpsit* would lie for any deficiency after foreclosure. See also ante, page 775, note (B).

mortgage money at different periods, and died (u). His nephew afterwards paid off a farther sum. Then R. filed his bill against the representatives of W., to foreclose the equity of redemption, and obtained a decree for that purpose, which became absolute. Then R. got into possession. The value of the premises not being equal to the mortgage-money, R.'s executors put up the estate to sale by public auction, but no sum being bid equal, in their opinion, to the value, the estates were bought in by a trustee for them, at 400*l*. Notice of the day and time of sale had been sent to D., who was the executor of E. Then the executors of R. brought an action against the executors of E., on the bond for the remainder of the mortgage-money, unsatisfied by the sale of the estate, and obtained a judgment at law. Then the executors of E. filed a bill, paying an injunction, and that the bond might be delivered up to be cancelled; insisting that the mortgagee having foreclosed the equity of redemption, and taken the pledge, had made his election, and relinquished his right to a personal remedy. But it was answered, that the executors of the mortgagee were certainly entitled to proceed upon the bond for what the pledge proved deficient to pay. And the Chancellor was of opinion with those who supported the action, that they had a right to proceed at law (H).

(u) *Tooke v. Hartley*, 2 Bro. C. C. 8 Ves. 531, et infra, p. 1003, in no-126. [S. C. 2 Dick. 785; and cited *ibid.*—Ed.]

(H) Lord Thurlow's judgment in this case, as reported by Mr. Dickens, was as follows:—His Lordship was clear that the defendant, the mortgagee, under the mortgagor's covenant in the mortgage-deed, was entitled to be paid what was due on the mortgage; that so long as he kept the estate, he must take the pledge as a satisfaction, because, by not knowing what it would produce, he could not say any thing was due; but if he sold the estate fairly and without collusion, and for the best price, it would then appear whether it produced the amount of the money reported due; and to the extent of what it did not, the mortgagee had a right, and so it was then established, to bring an action against the mortgagor, to recover the deficiency; and therefore his Lordship disallowed the cause, and dissolved the injunction. *Tooke v. Hartley*, 2 Dick. 785.

Mortgagee cannot sue on bond after foreclosure till he has sold estate.

From Lord Colchester's MSS. it appears that Mr. Mansfield, of counsel for the plaintiff, strongly insisted in the above case that the defendant ought to be restrained; for that, if he had kept the estate after the foreclosure, upon suing the bond at law, the foreclosure, by the rules of equity, would have

Third report of Tooke v. Hartley.

Notice of sale after foreclosure, should be given to mortgagor.

But in such case [that is, where a mortgagee has procured an absolute decree of foreclosure by fair means, and afterwards offers the estate for sale by auction,] it is prudent to give the mortgagor notice of the day and time of sale, so that he may prevent it if he please, by redeeming; and that mode of proceeding will be an answer to any objection, or the foundation of fraud in transacting the sale (v).

Mortgagee suing on bond, or collateral security after foreclosure, revives redemption (1).

But if the mortgagee, after having obtained a decree to foreclose, take out process upon any counter-security, with intent to recover his mortgage-money, this amounts to a waiver (x).

(v) [This paragraph is remarked on in the succeeding note.—Ed.]

(x) *Dashwood v. Blythway*, 1 Eq. Ca. Abr. 317, pl. 3.

been opened, and the mortgagor, on paying the debt, might have had his estate again;—that, as he was precluded from this by the sale of the estate by the mortgagee, the debt must in equity be considered as satisfied and gone;—that it might open a door to collusion in the sale of mortgaged estates, and would be very oppressive upon the borrower. But the Lord Chancellor held, that the mortgagee, after foreclosure absolute, had a right sell the estate and sue on his bond too, and that there was no reason the lender should lose part of his debt, and be prevented from enforcing the additional security he had taken; and refused to continue the injunction. Nevertheless, his Lordship offered to continue the injunction to a hearing, being a new point in species, if the plaintiffs would bring the money into court; but the plaintiff not being able to do that, he refused the injunction. 3 Bro. C. C. 125, Mr. Bell's edition, note (1). For further observations on this decision, see the next note.

Mortgagee may sue on bond after foreclosure.

In a previous case of *Aylett v. Hill*, 2 Dick. 551, the same noble Lord held, that a mortgagee might proceed at law on his bond, notwithstanding he had obtained a decree of foreclosure. But the Reporter adds, "*Quære*, whether having obtained possession of the pledge, he could do it till the pledge has been *bond fide* sold, and it is seen whether it is deficient to answer the whole of the debt?" An answer to this question is attempted to be given in the succeeding note, towards the latter end.

Mortgagee restrained from proceeding on bond, after foreclosure, under circumstances.

(1) The latest case on this head is that of *Perry v. Barker*, 8 Ves. 547, and 13 Ves. 198, where, under the circumstances, a mortgagee was enjoined from proceeding at law on his bond, after he had obtained an absolute decree of foreclosure, and had sold the mortgaged premises. This case deserves to be particularly stated. The facts were shortly these:—The defendant (a mortgagee of a term of 500 years to secure the sum of 800*l.* and interest, with the usual covenants, and a joint and several bond) in Hilary Term, 1797, filed a bill of foreclosure; and in February, 1798, the usual decree was made. The Master's report ascertained the sum of 909*l.* to be due to the mortgagee, who in July following took possession of the estate; and in November, 1798, the

As if a mortgagee, after having got a decree to foreclose, which is signed and enrolled, bring an action of debt on the bond

decree of foreclosure was made absolute. In February, 1799, the mortgagee sold the premises by auction for 800*l.* and afterwards brought an action on the bond for 135*l.* with interest, from the 28th of June, 1799, the period of completing the said sale. The bill was filed by the mortgagor in 1803, praying a redemption, and an injunction; or, that the defendant might be decreed to have elected to take the premises in satisfaction of his demand, and might in that case be decreed to deliver up the bond, and be for ever restrained from proceeding against the plaintiff. The question was, whether a mortgagee having obtained an absolute foreclosure, by which the estate was become his property, could afterwards sue on a collateral security upon the principle that there was still a subsisting loan. Lord Eldon, on the first hearing of the cause observed, that no case had been produced, previous to 1786, in which, after a foreclosure, the mortgagee had proceeded to sale, and afterwards brought an action for the money. That circumstance had some weight. Mr. Maddocks (of counsel for the defendant in *Tooke v. Hartley*), who knew the practice of the court well, felt great difficulty in contending broadly, that the mortgagee might sell the estate after foreclosure, and then proceed upon the bond; and was driven to the admission, that the foreclosure was opened under those circumstances; at the same time stating, not very consistently, that the action might be for the remainder. The action in that case must have been for the whole money; for it was an action on the bond. But consider, added his Lordship, how it would be if the action had been on the covenant; laying the damages for the remainder of the money. It is not very consistent to say, you open the foreclosure, desiring the mortgagor to bring in only the remainder of the money; for the consequence of opening the foreclosure would be, that a new account should be taken of the principal and interest; and the money to be brought in upon that footing should be all that was due, or nothing. The case of *Tooke v. Hartley*, certainly did not decide this; for the estate, in fact, sold or not, was in the possession of the mortgagee; and if placed in the same situation as if there had been no foreclosure, the estate being in his possession what was required by justice as to the re-conveyance, might be done by the court. But, where it was sold to a stranger, the power of re-conveyance was gone, and the mortgagor could not have any right [to the estate in that case even if the redemption were] to be considered as re-opened. At the same time Lord Eldon certainly understood Lord Thurlow's opinion to have been, that, whether the estate was sold to a stranger, or remained in the possession of the mortgagee, there was no distinction; but an action might be brought for the difference. That opinion of Lord Thurlow, and the circumstance, that this particular case was never decided, made it proper for Lord Eldon then to grant the injunction, extending it to stay trial, which he did accordingly, the plaintiff paying the money into court in the mean time. 8 Ves. 531.

Three years after the granting of this injunction, the cause again came on before Lord Chancellor Erskine, who said, that he should consider Lord Thurlow's opinion to have been what Lord Eldon in a former stage of the

[1003 *]

Consequence of opening foreclosure.

After foreclosure mortgagee may sue on bond whether he has sold estate or not. Semb.

Injunction in Perry v. Barker made perpetual.

given at the same time, for payment of the money and performance of the covenants in the mortgage-deed; such action

proceedings had stated it to be, but Lord Erskine then inclined to a middle course, that though, when a mortgagee has obtained a decree of foreclosure, the estate is his, yet if he will bring an action, he shall give the mortgagor an opportunity to redeem; and the true equity and justice of the case seemed to be, that the foreclosure was opened by the action; but then there must be some mode of bringing forward the mortgagor; giving him notice that he might redeem; or the mortgagee previously acknowledging that he was a trustee. On a future day, Lord Erskine declared himself to continue of the opinion he had already expressed, which was confirmed by a communication with Lord Redesdale. And as he (Lord Erskine) thought the foreclosure was opened, and as the sale was so long ago as 1799 [7 years], and the defendant's demand was so inconsiderable [135l.], *it was scarcely possible that the mortgagee should seek to put himself in circumstances, that would allow the mortgagor to redeem*; the consequence of which would be, that the mortgagee must account for the rents and profits, as if no sale had taken place, and as if he had continued in possession. Under these circumstances Lord Erskine conceived the best decree would be, to make the injunction perpetual. He ought not however to do that without observing, that he was not sure, whether the embarrassment upon this subject had not arisen from this, that the court in one respect did not act altogether up to his own principle in the case of a mortgage. The mortgagee took a double security: the personal covenant of the mortgagor, and usually a bond also, and a pledge of the estate. If, before he filed a bill of foreclosure, he sued upon the bond, or brought an ejectment, the court would not stop any of his remedies. But if he filed a bill of foreclosure, and the mortgagor was unable to procure the money, the estate, whatever might have been the value, was gone. Was it not then extraordinary that he should have the advantage both ways; that, foreclosing, he should keep the estate, though of much greater value, but if it was a scanty security, he should recover the difference? What Lord Erskine meant by presuming to say, the court had not acted up to its principle, was this, that perhaps, instead of a foreclosure, a decree for sale of the estate would be more analogous to the relative situation of lender and borrower, and his Lordship had been informed by Lord Redesdale, that such was the course in Ireland; a decree for sale instead of a foreclosure; and if the sale produced more than the debt, the surplus went to the mortgagor; if less, the mortgagee had his remedy for the difference. [See an Irish decree of foreclosure, ante, 963, n.] Lord Erskine further observed, that if in the instance before him, there was any probability that the mortgagee could get the estate back again, he ought to have a time limited for that purpose then he ought to tender a conveyance, and the mortgagor should have a given time to redeem; but under the circumstances of this case, the mortgagee's demand being so inconsiderable, the proper decree was an injunction, and his Lordship would not give costs; as there had been a doubt upon the subject. 13 Ves. 205.

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Course in Ireland is decree for sale, instead of foreclosure.

will open the foreclosure, and let in the equity of redemption of the mortgagor. For though the court will, in its discretion,

This decree proceeds upon very unsatisfactory grounds, 1st, A vein of doubt and indecision pervades the whole judgment; 2d, It may be asked by what measure the mortgagee is to consider the difference for which he sues, inconsiderable,—if by the sum lent, then one-eighth of his debt after a lapse of seven years, would be too small a claim to excite the attention of a court of equity; so that if his mortgage were for thousands instead of hundreds, he must be content to lose 1350*l.* as an inconsiderable sum;—if by the actual value of money in dispute, it is presumed that by far the greater portion of suitors in the Court of Chancery would not conceive the sum of 135*l.* to be a trifling demand. But, 3d, Lord Erskine appears to have been of opinion, that when a mortgagee has foreclosed and sold the estate, he cannot proceed on his bond for the deficiency, because if he does so proceed, he re-opens the redemption, and no redemption can be effected, inasmuch as the mortgagee having parted with the estate, cannot re-convey it to the mortgagor on receipt of his principal, interest, and costs; which is at variance with all the authorities on this subject, and may freely be pronounced to be bad law. That a mortgagee may sue on a collateral security after foreclosure and sale, appears never to have been doubted, and is fully established by the cases mentioned in the preceding note. His Lordship was also of opinion, that if after a foreclosure and sale there is any probability that the mortgagee can get the estate back again, he should then have a limited time for that purpose, at the end of which period he should be at liberty to proceed on his bond, provided he could then tender a conveyance. This is very vague doctrine, and such as would impose on the mortgagee incalculable difficulty, and after all be productive of very little advantage; for a purchaser would not willingly re-convey without an advance of price, which must devolve solely on the mortgagee, and which it cannot be expected he would voluntarily tender for the sake of a troublesome, and perhaps litigious, mortgagor.

Lord Erskine's decision in Perry v. Barker reviewed.

It should be observed, that Mr. Dickens's report of *Tooke v. Hartley*, as cited in the preceding note, was not published until after Lord Eldon had stated what he conceived Lord Thurlow's opinion in that case to have been. Mr. Belt on this, remarks, "Lord Thurlow's clear opinion was, that an action might be brought for the difference, if the mortgaged estate were sold out and out fairly, *without collusion*, and for the best price, and not as (through some mistake) stated in *Perry v. Barker*, 8 Ves. 531, *if the estate still remained in the possession of the mortgagee.*" See 2 Bro. C. C. 125, n. (1), Belt's edition. If Mr. Dickens's report can be relied on, there is certainly a very material error in Lord Eldon's expression of Lord Thurlow's opinion. But it should be remembered that Lord Colchester's MS. note of *Tooke v. Hartley*, which Mr. Belt supposes to have been taken by Lord Chief Baron Richards, when at the bar (see 2 Bro. C. C. 125, Belt's n. (1),) omits all notice of this very important distinction, and that the late Sir S. Romilly in his note of the same case (cited 8 Ves. 528), alludes to no observation whence it may be in-

Whether mortgagee can sue on bond after foreclosure, and before sale.

after a reasonable time, allow the mortgagee to take the benefit of the condition, annexed to his estate; yet, as this is re-

ferred that Lord Thurlow was of the opinion imputed to him by Mr. Dickens. Without insinuating that the report of the latter gentleman is a prejudiced report, (to which his *quære* on *Aylett v. Hill*, in the preceding note (H), ante, page 1002, may be thought to give some countenance) it becomes an object of pressing consideration to inquire, whether this half-adopted dictum of Lord Eldon's,—that a mortgagee may, after foreclosure and before sale, sue on his bond for what he conceives to be still due to him,—can be supported on principle, in opposition to Mr. Dickens's report of Lord Thurlow's judgment, as also in opposition to Lord Erskine's observations in the above case of *Perry v. Barker*, that if the mortgagee were in such case allowed to proceed, a palpable injustice would be the result by giving him a double advantage?

Reasons for
opinion that he
can.

It is admitted that the equity of the court can be more substantially administered where the foreclosure is opened during the continuance of the mortgagee's possession than when he has parted with the estate; because if the mortgagor redeems, the pledge can be returned him in the same manner as if no foreclosure had taken place; but a question presents itself, where the premises have not been sold, how the mortgagee is to say that any difference is due to him, until he has ascertained the real value of the estate by actual sale? The solution of this question is quite beside the argument; for supposing a mortgagee to foreclose, and (still retaining possession of the estate) to bring an action on the bond for the whole money, or on the covenant for a supposed deficiency, the equity of redemption would be revived, and the mortgagor allowed time to redeem if he conceived himself hardly dealt with, and that time would be enlarged again and again in order to give him an opportunity of finding a purchaser, but if no person can be found who will accede to the mortgagor's price within a reasonable time, the presumption is, that the mortgagee has set the real, and the mortgagor the fictitious value on the property pledged. A second foreclosure would then be decreed, and the mortgagee allowed to proceed at law on his bond or covenant, if he had not already done so, for the deficiency, which would neither be giving him an undue advantage, nor be productive of any injustice to the mortgagor. It is also observable, that in Lord Colchester's note of *Tooke v. Hartley*, the point seems incidentally determined, or rather admitted by both judge and counsel. Mr. Mansfield insisted, that notwithstanding the mortgagee might have kept the estate after foreclosure, yet might he have sued on the bond, the consequence however of such suit he admitted would be, the revival of the equity of redemption; and Lord Thurlow (apparently acquiescing in that doctrine, but carrying it still further) said the mortgagee after foreclosure had a right to sell the estate and sue on his bond too. It appears that the mortgagee in *Tooke v. Hartley*, had actually sold the estate, Lord Thurlow was not therefore called on to decide (as Mr. Dickens states him to have done) that so long as the mortgagee kept the estate he could not sue on his bond. It is lastly observable, that if it be law, that a mortgagee will be restrained from suing on his bond whilst he remains in possession, there is no instance where the equity of redemption can be opened by proceeding on a collateral security; for when the estate has been sold *bonâ fide*, the redemption which is said to be re-opened, dwindles into a

quiring to have strict law, and often attended with actual injustice, and the payment of the money is the essence of the

mere matter of account, the mortgagee suing for the difference, and not being able to restore the estate; and that unless the mortgagee could sue on his bond before sale, the value of his collateral security would be reduced to a mere nullity. On the whole, therefore, it is submitted that Lord Eldon's conception of the doctrine contains a correct statement of the law, viz. that *whether the estate be sold, or whether it remain in the possession of the mortgagee, he may sue on his collateral security*; and that the observations of Lord Erskine in *Perry v. Barker*, which appear to have been a surprize upon him, also contain a true transcript of the law, namely, that the mortgagor, being once foreclosed must lose his estate though of greater value than the money advanced on it, and if of less value, then that the mortgagee might recover the deficiency by suing on his bond, re-opening the redemption, and procuring a second foreclosure,—to do which, it would be next to impossible that the mortgagee (without fraud) should obtain the fee-simple of the estate for less than its actual value, or receive more than the money he really advanced.

[1006*]

The learned author suggests the propriety of giving the mortgagor notice of the intended sale after foreclosure, in order that he may have an opportunity of redeeming if he pleases, and to prevent any objection, or the foundation of fraud in transacting the sale. In the above mentioned case of *Perry v. Barker*, it was contended for the plaintiff that the mortgagee could not proceed to sale before he decided whether he would consider the estate a pledge or not; he could not determine by the event, but was bound to give notice to the mortgagor of his intention to sell, especially if he proposed a sale by auction, which might not go near the value; and that he must give notice that he meant to sell as a trustee, and put it out of his own power to take the surplus, if any should arise after deducting his principal, interest, and costs. Such a precaution, though not absolutely necessary, is worthy of attention if the mortgagee sells with an impression that the produce will be insufficient for his reimbursement, but the necessity of pinning himself down to account for the residue can neither be supported nor recommended.

Of giving notice of sale after foreclosure.

If the mortgagee is apprehensive that the estate will prove of less value than his principal, interest, and costs, the course open to him, is to take possession of the premises by ejectment, and then sue on his collateral securities. He may afterwards foreclose and sell the estate, in which case no inconvenience would ensue, except that if he first recovers the whole money on the bond or covenant, he would, by the foreclosure and sale obtain a double payment, which however neither the court nor the mortgagor would permit. Whereas, if the mortgagee foreclose in the first instance, the mortgagor's executor, seeing him in possession, apparently as absolute owner, might distribute the assets, and leave little or nothing for the attachment of the personal bond or covenant; as to which it is observable, that if the mortgagee sue on the bond, he must sue for the whole money, if on the covenant he may lay his damages at any stated amount.

What course mortgagee should follow, when he conceives estate to be of less value than debt.

On the whole doctrine a question very naturally arises, whether a mortgagee in fee having foreclosed, can convey the fee-simple and inheritance *Mortgagee selling after fore-*

contract, and effects substantial right between the parties, the court is willing to seize any opportunity, either of an actual or implied consent of the mortgagee to open the foreclosure, and let in the mortgagor to redeem.

Bill of revivor by mortgagee for account of assets and satisfaction of bond, without suggestion of deficiency, no waiver of decree to foreclose.

[1007]

But a bill of revivor, and supplemental bill, will be no waiver of a decree to foreclose (y). Thus, where, in 1717, a bill was brought to redeem, or be foreclosed; and likewise a cross bill to redeem, on which there was a decree to be let in, on payment of principal, interest, and costs, or else to be foreclosed: the mortgagor died; and the account being taken, the plaintiff, finding the estate insufficient, brought a new bill of revivor, and partly a supplemental bill, both to review the former decree and proceedings, and likewise to have an account of the assets of the defendant, the mortgagor, and thereout to have satisfaction for a bond, which was given, as a collateral security, with the mortgage. The defendant, who was the executor of the mortgagor, pleaded the former decree, in bar; insisting, that the plaintiff had elected his satisfaction, and had not so much as suggested, that it was deficient, so that it did not appear, but that he might receive a double satisfaction for his debt; and that it was plain he had not waived the mortgage by his bill of revivor. The plaintiff insisted, that it was the practice of the court, that taking out of process, or making use of any counter-security, was, in itself, a waiver of the foreclosure; and that a mortgagee had always

(y) *Birch's case*, Gilb. Eq. Rep. 186.

closure can make good title to purchaser.

to a purchaser, without the concurrence of the mortgagor or his heirs, and whether he can guarantee an unimpeachable title to such purchaser, and compel a specific performance. It is presumed that he can, and that all future openings of the redemption will not affect the buyer. Such is the tenor of all the authorities on this subject, and though it is common to direct all proper parties to convey in the decree of foreclosure, yet that, it is conceived, is added with a view to embrace any empty outstanding estate in the mortgagor, or those claiming under him. The reverse would level the remedy by foreclosure to a mere name. The consequence is, that after foreclosure and sale, the redemption cannot in fact be revived. The relief which the mortgagee obtains by suing on his bond after foreclosure and sale, is, by bringing in the deficiency: but the redemption is so far opened as to make him accountable for the *bonâ fide* price of the sale.

his election to waive, and open the foreclosure, and to have recourse to his bond and covenant, if he thought proper. But the court was of opinion that the plaintiff, by his revivor, had not waived the mortgage, or so much as suggested a deficiency; and the plea was directed to stand for an answer, without liberty to except.

Except in the instances already mentioned, I do not find that any rules have been, nor, do I apprehend, any can be laid down by courts of equity, as to the exercise of their jurisdiction in opening foreclosures, either with respect to the time, which shall be considered as a bar, or to the particular circumstances, which will entitle a suitor to this interposition of the court: for cases of this sort embrace such a variety of considerations, and are frequently so complicated in their nature, that each depends, in a great degree, upon its own combined circumstances; and may be rather considered, as an instance of the fact, that the courts will interfere to open a foreclosure, than as a general rule, as to the circumstances in which relief will be given.

Not settled what circumstances will open foreclosure.

Thus, a decree of foreclosure was opened, after sixteen years, where the bill was against a mortgagee, who had obtained his security, part by original mortgage, and part by assignment, *procured under colour of being a friend to the mortgagor*; but, in truth, with a view to get him into his power, that the mortgagee might, upon his own terms, purchase his estate, which was worth three times as much as the money that had been advanced thereupon (*x*).

Decree opened after sixteen years, on case of fraud.

[1008]

But where the mortgagee, in 1711, entered into possession upon a foreclosure made absolute by consent, and, considering himself as having an absolute estate in the mortgaged premises, by virtue of the decree, proceeded to make improvements thereon, by pulling down buildings that were ruinous; the mortgagor, six years after, in 1717, moved the court for

Motion by mortgagor (six years after his consent to foreclosure) for time to redeem, rejected in D. P.

(*x*) *Burgh v. Langton*, 15 Vin. Abr. 476, pl. 2. S. C. 2 Eq. Ca. Abr. 609, pl. 5. 2 Bro. P. C. 544, [et vide ante, pages 976 and 978, note (Q), for

two cases, where the redemption was opened, after foreclosure, on the ground of fraud and collusive dealing.—*Ed.*]

farther time to redeem; and it was^a so ordered upon terms (a). But this, and several other orders grafted thereupon, similar in their nature, were reversed, on appeal to the House of Lords, upon the grounds, that it was not consistent with the practice of courts of equity, or warranted by precedents, to enlarge the time for redemption, after the mortgagor's acquiescence for six years, under a foreclosure, by his own consent; especially, after an alteration had been made in the estate, either by pulling down the buildings, enlarging them, or otherwise; that the appellant had been two years in possession, before he began alterations on the estate, when he might look upon it as his own, having such a title as would satisfy a purchaser; and that the money, reported due to the appellant, amounted to as much as the clear rent, at fifty-eight years purchase, exclusive of subsequent interest and costs that would incur, if the litigation were suffered to proceed.

Foreclosure not opened by consenting to examine witnesses.

In the last case, the mortgagor urged, the appellant's acquiescing at first in the order made in 1717, in the examining witnesses, and not opposing the subsequent orders for enlarging the time, as amounting to an admission, that those orders were just, and that the estate in question was still redeemable.

Foreclosure not opened on ground of under value or parol permission to redeem (x).
[1009]

So, in the case of *Wichalse*, executor of *Wichalse v. Short*, neither over-value in the estate, nor a parol agreement to redeem, were held by Lord Cowper and Lord Harcourt, Chancellors, to be sufficient reasons to open a foreclosure after twenty years (b); and their decree was afterwards confirmed on appeal to the House of Lords.

- (a) *Lant v. Crispe*, 2 Bro. P. C. 111. 2 Eq. Ca. Abr. 509, pl. 21. 15 Vin. Abr. 177, pl. 1. 7 Vie. Abr. 296, Abr. 467, pl. 16; and 469, pl. 13. v. *Short*, 1 Bro. P. C. 414. 2 Eq. Ca. Abr. 177, pl. 1. 7 Vie. Abr. 296, pl. 13. 15 ib. 478, pl. 4. [5. C. 1 Cl. Ca. 218.—Ed.]
- (b) *Wichalse*, Executor of *Wichalse*, Ca. 218.—Ed.]

Test confirmed.

(K) In *Cox v. Peelle*, 2 Bro. C. C. 334, a bill was filed to carry into execution a parol agreement (entered into by the parties by means of their solicitors), that there should be a decree of foreclosure, that the estate should be sold, the mortgagee paid her principal and interest, and that the remainder should be handed over to the mortgagor. This bill was dismissed at the Rolls, as within the statute of frauds. On an appeal to the Chancellor, evidence of the agreement was read *de bene esse*, but the decree was affirmed.

In that case W., the plaintiff's late husband, having mortgaged his estate at L., to several persons, and the mortgagees pressing for their money, the defendant S. was prevailed on to advance 1000*l.* for discharging those incumbrances; and, accordingly, the former mortgages were assigned to him by deed, dated the 29th of September, 1691. He afterwards advanced to W. a farther sum of 500*l.* on the 3d of December, 1692; so that the estate then stood mortgaged to him for 1500*l.* and interest.

Fourteen years after foreclosure mortgagor devises estate to wife, who files bill to redeem, on ground of repeated promises by mortgagor to her husband, that he would reconvey on payment of money. Bill dismissed.

Neither principal or interest being paid at the time limited by the mortgage, or for above two years afterwards, S., in 1694, exhibited his bill against W., in order to foreclose; to which bill, W. put in an answer, admitting the 1500*l.* and interest to remain due, and offering to pay the same, at such time as the court should appoint; but desiring a reasonable time to sell his estate for that purpose.

On the 10th of July, 1695, this cause was heard; and a reference was made to a Master to compute the sum due, &c. and, on payment thereof by W. at or before Lady-day then next, he was to have a reconveyance from the plaintiff; but, in default thereof, to stand foreclosed; and it was decreed, by consent, that if, in the mean time, W. could procure a purchaser for the estate, S. should join in a sale thereof.

The time for payment, appointed by the Master, which was the 29th of August, 1696, was afterwards enlarged to the 24th of July, 1697, when, the money not being paid, nor any purchaser of the estate procured, the decree of foreclosure was, on that day, made absolute, and, it being afterwards duly signed and enrolled, S. was put in possession of the mortgaged estate.

The mortgagor lived above eight years afterwards, but never attempted to open the foreclosure, or to disturb S. in his possession: yet he, nevertheless, took upon him to devise this estate to his wife; who, in Hilary Term, 1708, about three years after her husband's death, exhibited her bill in the court of Chancery against S. praying an account of the rents and

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Short.*

profits of the premises, and to be let into a redemption of the estate upon a suggestion that the former decree and proceedings had been obtained by collusion.

To so much of this bill as sought to lay open the foreclosure, the defendant pleaded the enrolled decree, and his possession under the same in bar; and, by his answer, denied any collusion in obtaining that decree. And upon arguing this plea before Lord Chancellor Cowper, it was allowed.

But the plaintiff having replied, and witnesses being examined, the cause was heard before Lord Chancellor Harcourt, in April, 1714; when his Lordship declared, that the defendant had fully proved his plea, and therefore dismissed the bill with costs; which decree of dismissal was afterwards affirmed, on appeal to the House of Lords.

It appears, both from the reasons suggested by the parties to the appeal to the House of Lords, and by the report of this case (c), that the plaintiff, in the original suit, did not rest solely upon the ground of fraud and collusion, in the original decree for foreclosure, but also relied upon frequent promises made, subsequent to the decree, by the mortgagee to the mortgagor, to be accountable for the rents, and to re-convey on the re-payment of his money, and likewise upon the value of the estate, which was considerably more than what was due to the respondent. But Lord Harcourt, in giving his opinion, said, that the plaintiff came too late; for that he knew no instance where a man had been let in to redeem, by a new bill, after a decree of foreclosure signed and enrolled, upon any parol agreement or declaration, or *by reason of any over-value of the estate*; such a practice would be of dangerous consequence, and shake abundance of titles (L).

(c) 2 Eq. Ca. Abr. 177, pl. 1, in *notis*.

*Foreclosure not
opened by mort-
gagee's receipt
of more than
debt out of
rents.*

(L) The bill in *Mallack v. Galton*, was to be let in to redeem, alleging, that the mortgagee was greatly overpaid, by perception of the rents of the mortgaged premises: the defendant pleaded in bar, a decree of foreclosure signed, and enrolled, under which the redemption had been absolutely foreclosed. The plea, on agreement, was allowed.

But it is observable, on the principal case, that the mortgagor *himself* had acquiesced, during his life-time, under the decree; and that the plaintiff's claim was that of a voluntary devisee of an equity of redemption, which had been duly and regularly foreclosed, *near seventeen years before*; for, perhaps a difference would be made if the application came early, and was from the mortgagor himself (cc); especially, if all things were *in statu quo*, and no injury would result to the mortgagee from expences incurred in repairs, improvements, or otherwise; as, in such case, although the mortgagee hath the legal title, yet the mortgagor seems to have the greater equity. Besides, as the original intention of the parties was a loan, not a purchase, no injustice would be done by giving the mortgagor time to redeem, upon making full satisfaction to the mortgagee. Such a distinction seems to be warranted (d), by the observation of the court in the case of *Roscarrick v. Barton*; in which, redemption was denied to a remainder-man after twenty years; but the Lord Keeper said, that he made a great difference between parties that came to redeem, *who were not parties to the mortgage*, and those that were (u).

Husband's bill to redeem in last case would perhaps have been entertained.

[1011] .

The mortgagee calling it a debt, in his will, to a collateral purpose only, will not alter the nature of the estate the mortgagee hath in the premises, after a foreclosure made absolute, and many years possession by the mortgagee.

Mortgagee devising his interest in estate as debt, insufficient to open foreclosure (u).

Thus, where Charles Stuteville (e), 1674, 1675, 1677, and 1678, made several mortgages of his estates, in the county of S., to Sir Francis North, for securing several sums of money,

(cc) [This is very questionable, at the present day.—Ed.]

(d) 1 Ch. Ca. 220, ante, 972, 3.

(e) *Tooke v. Bishop of Ely*, 1 Bro. P. C. 119. *Stackville v. Dolben*, 15 Vin.

Abr. 476, pl. 1, marg. 2 Eq. Ca. Abr. 608, pl. 1. [*S. C. Sel. Ca. Ch. 10*, cited, where it is said the judge took time to consider, but the parties compromised.—Ed.]

(M) The case of *Roscarrick v. Barton*, has long since been over-ruled; see ante, 972, n. (P).

(N) See similar law in *Silberschildt v. Schiott*, 3 Ves. & Bea. 45; and ante, vol. i. 423, n. (P).

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Mortgage of Elys.*

amounting in the whole to 2300*l.*; and, in 1682, Sir Francis North, in consideration of 2386*l.* 5*s.* paid to him by Lady Glenham, assigned over all his securities, upon this estate, to her and her trustees. Lady Glenham, having another demand upon Stuteville, of 800*l.* she, in Easter Term, 1682, exhibited her bill in Chancery, praying, that he might either pay her both those debts, with interest and costs, or be foreclosed of his equity of redemption. The cause being heard in Easter Term, 1683, the defendant was decreed to pay both debts, with interest and costs, by a limited time; and, in default thereof, that he should be foreclosed: but, he neglecting so to do, the foreclosure was afterwards made absolute, and the decree enrolled.

[1012]

In May, 1684, Lady Glenham assigned this decree, and all her interest therein, to Mr. Justice Dolben; who being kept out of possession, did, in 1683, bring several ejectments, and thereby recovered part of the premises; the residue being held by Mrs. Stuteville, the mother of Charles, as having an estate for life prior to the mortgages.

Soon afterwards, Justice Dolben died, having made his will, and thereof constituted Sir Gilbert Dolben sole executor and residuary legatee; but in this will was the following clause: "And, if Mr. Stuteville's *debt be well paid, as I doubt not but it will*, I order my executor, Gilbert Dolben, to pay the sum of 4200*l.* amongst the children of my nephew, John *"Dolben."* And, upon calculation, this sum of 4100*l.* exactly agreed with the money decreed to be paid, with the interest thereof, from the time of the decree to the date of the testator's will.

Upon the death of Mrs. Stuteville, Sir Gilbert brought an ejectment, and recovered the lands held by her, so that he was in possession of the whole estate.

In July, 1694, Charles Stuteville exhibited his bill in Chancery against Gilbert Dolben, praying, that he might be at liberty to redeem, on payment of the mortgage-money, and

interest; but, to this bill, the defendant pleaded the former decree of foreclosure, and insisted, that the plaintiff ought not to be let in to a redemption.

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v.
Bishop of Ely.

On the 10th of July, 1695, this cause came on to be heard before the Lord Chancellor Somers, when the defendant's plea was allowed; but his Lordship recommended an accommodation, and accordingly it was ordered, by consent, that the defendant should be at liberty to redeem, upon payment of principal, interest, and costs, to be computed by the Master. The plaintiff, however, not complying with this order, nor being willing to abide by this judgment of the court on the plea, moved for leave to amend his bill: and this the court thought proper to grant, on condition of his giving his own recognizance not to disturb Gilbert Dolben, or his tenants, or commit waste; but if he refused to comply with this condition in a month, then his bill was to be dismissed with costs, without farther motion; and Stuteville not complying with this order, his bill was dismissed accordingly.

Stuteville, still apprehending he had a right to redeem, by deed, dated the 24th of May, 1700, settled the premises upon trustees, in trust to sell, and pay Sir Gilbert Dolben and all his other creditors; and then, in trust for himself, his heirs, executors, administrators, and assigns. He also made his will, and thereby devised all his estate, real and personal, and his equity of redemption in the premises, unto Catherine Tooke, her heirs, executors, administrators, and assigns, and soon afterwards died.

[1013]

In December, 1702, eighteen years after the decree of foreclosure, Sir Gilbert Dolben assigned over all his estate and interest in the premises to the bishop of Ely, in consideration of 8000*l.* who afterwards purchased of the representatives of Mrs. Stuteville, a debt of 5800*l.* due to her for the arrears of her jointure, and for which she had obtained a decree, whereby the whole stood charged with the debt.

In June, 1703, Catherine Tooke exhibited her bill against Sir Gilbert and the Bishop of Ely, praying a redemption of

the premises, on the foot of Lady Glenham's decree; and that she might have a re-conveyance; and an account of the rents and profits. To this bill, Sir Gilbert pleaded the decree of foreclosure, the Bishop likewise pleaded that decree, and his several purchases from Sir Gilbert, and from the representatives of Mrs. Stuteville; and upon arguing these pleas, before the Lord Keeper Wright, on the 21st of July, 1704, they were allowed.

From this order, the plaintiff appealed; insisting, principally, that, by Mr. Justice Dolben's will, and the subsequent proceedings, the foreclosure was opened; and that nothing had been since done, to bar the appellant of her equity of redemption.

On the other side it was contended, that Sir William Dolben's calling it *a debt* in his will, to a collateral purpose only, could not alter the nature of the estate he had in the premises, any more than the calling a leasehold estate an estate in fee-simple, would have converted the leasehold into a freehold; that the bishop of Ely was a purchaser of the estate, at a very great price, under a decree which had been signed and enrolled above twenty years, and which had been twice allowed, as a good bar of the redemption; and so it was held by the Lords, and the appeal was dismissed, and the decree and order was affirmed.

Foreclosure not set aside after twenty years, for matter of form only (o).

Nor will a decree of foreclosure be set aside, after twenty years, for matter of form only; not even although the estate become of considerably more value than the money lent thereon: but a demurrer to such bill will be good (*f*).

[1014]
No decree against part of

If tenant in tail of an estate (*g*), subject to a mortgage, suffer a recovery, and sell part thereof, and afterwards the

(*f*) *Jones v. Kenrick*, 15 Vin. Abr. 2 Eq. Ca. Abr. 602, pl. 31.
470, pl. 18. S. C. 3 Bro. P. C. 315. (*g*) *Kirkham v. Smith*, 1 Ves. 261.

(O) A foreclosure will not at any time be set aside for want of mere matter of form in obtaining the decree, especially if twenty years have elapsed since the decree was pronounced. This is, perhaps, the more correct expression of the doctrine in the text.

mortgagee exhibit a bill for foreclosure or sale; though, in law, he hath a right to have all the parts of the estate liable to his satisfaction, yet the equity is, that the part sold should not be meddled with, unless the remainder be not sufficient for the satisfaction of the mortgagee (P). *estate sold, if remainder will satisfy mortgage.*

On mortgage of a *reversion*, and decree to redeem, instead of the alternative, "*or the mortgagor to be foreclosed,*" the court decreed, that the mortgagee *should sell to satisfy the debt*. Thus (h), where G. being in his life seised in fee of a reversion of lands depending upon the life of H. by deed, dated the 25th of November, 18 Jac. mortgaged the lands to A. and K. and their heirs; afterwards the mortgage became forfeited; when K. by deed, dated 1st March, 22 Jac. released all his right, title, interest, claim, and demand, in the lands unto A. and his heirs for ever. A., by his will, devised the said premises to L. in fee. L. being a merchant, and his livelihood consisting in the returns of money, and the consideration in the said deed of mortgage being 340*l.* disbursed in 18 Jac. upon a dry reversion, exhibited a bill to oblige the heirs at law of the mortgagor to repay the money, with damages, or else to have the lands decreed to him, to the end that he might sell them; and so the court decreed. *Reversion decreed to be sold to satisfy debt (Q).*

And if a mortgagor die, and his personal estate prove deficient to discharge the mortgage, the mortgagee may, on filing a bill to enforce payment of the money due, pray a sale of the *Personal fund deficient, and mortgagor dead, mortgagee may pray sale (N).*

(h) *Hew v. Vigues*, 1 Ch. Rep. 33. [S. C. vol. i. 424 and 426, n. (Q), et ante, 1056.—Ed.]

(P) But in this case the purchaser, it is presumed, must be a party, as he may redeem. As to redeeming both estates or neither, see ante, vol. i. 339, n. (Z); and *Stokes v. Clendon*, supra, p. 972, n. (N), for a case, where it was held, that one estate could not be foreclosed without making the owner of the other estate a party.

(Q) Where a dry reversion has been mortgaged, it seems natural to say, that since the mortgagee has chosen his security, he shall wait till circumstances render it productive. The courts however adopt a different line of argument, and think it inequitable that a mortgagee should be kept out of his money till the falling in of the particular estate.

(R) Lord Redesdale's notes refer to a case of *Hodgson v. Parker*, 26th July, 1791, to the following effect: "Bill by mortgagee in fee against the personal

mortgaged estate in the first instance. But in such cases there is a distinction where the same person is heir and also executor, and where those characters are filled by different persons. These two last-mentioned propositions were assented to by the court of Chancery in the following case:—S. (i), deceased, mortgaged the estate in question to D. in fee, and afterwards died, leaving T. his brother and heir at law, who also took out letters of administration. Then D. filed his bill against T., praying an account of the principal and interest due on the mortgage, and also a sale; and in case the mortgaged estate should not prove sufficient to pay the principal and interest due, that the deficiency might be made up out of the personal estate, and in case T. should not admit assets, that there might be an account of the personal estate. In the bill he stated the bond and mortgage, and that the personal estate was deficient; T. by his answer, admitted that the personal estate was very small, and would be deficient, and the cause coming on before his Honor, he ordered according to the prayer of the bill. From this decree the defendant appealed, because it had not ordered an account of the personal estate in the first instance, or that so much of the estate only, as should be necessary, should be sold. *Respondeo*; the decree is of course, the heir and personal representative being the same person; though, if they had been different persons, it would have been necessary first to have an account of the personal estate (s).

(i) *Daniel v. Shipwith*, 2 Bro. C. C. 155.

representative and the heir, for payment of mortgage debt out of the personal estate, as far as it would extend, and the deficiency to be raised by sale of the mortgaged estate. Decree accordingly." It is, however, to be observed on this, that the decree was on consent of the heir, &c. Reg. Lib. 1790. A. fol. 602 b. 2 Bro. C. C. 155, Belt's edition, n. (1); et vide *Pratt v. Hull*, 1 Sim. & Stu. 531, for an instance where a sale was prayed against the mortgagor and a subsequent mortgagee, ante, vol. i. 170.

[1015*]

Whether when estate is deficient, account of personal estate must be prayed in first instance.

(S) It may be inferred from this case, that a mortgagee cannot pray a sale on the deficiency of the estate to pay his mortgage debt, without praying an account of the personal estate in the first instance, unless the same person embraces the characters of both heir and personal representative of the mortgagor. Mr. Belt, however, conceives it to be the subsisting practice (notwithstanding the doctrine in *Plunkett v. Pearson*, 2 Atk. 51; and the decision of *Knight v. Knight*, 3 P. Wms. 331), to allow a mortgagee to bring a suit against the heir without bringing the personal representative before the court; see

Where [there are several executors, and one of them is indebted to the testator, for which he had given a security by way of mortgage upon his estate, if the co-executors are apprehensive that he is insolvent, and that the estate may prove a deficient security, bringing a bill against him to foreclose, is improper, because the testator having made him an executor, gives him an interest in the mortgage; the other executors should have brought a bill for sale of the estate (j)—*Ed.*]

One executor indebted to testator by mortgage, co-executors may pray sale.

And where the bill was to foreclose, and the defendant appeared (k), and stood in contempt for not answering to a sequestration, and the cause came on upon the sequestration,

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Mortgagee may pray sale, if estate be deficient, but sale never decreed on bill to foreclose (T).

(j) *Lucas v. Seale*, 2 Atk. 53. [The above is substituted from the report for the two unintelligible lines of the text found here in the 4th edition, the same case was mentioned, *infra*, 1046, where it was considered unnecessary to repeat it.—*Ed.*]

(k) *Dashwood v. Bithazey*, Mos. 196. [So in *Parry v. Wright*, 1 Sim. & Stn. 379, one of the defendants was out of the jurisdiction of the court, and the bill was taken against him *pro confesso*. —*Ed.*]

2 Bro. C. C. 155, n. (1), referring to 3 P. Wms. 333, n. (A), and *Fell v. Brown*, 2 Bro. C. C. 278.

(T) In *Dashwood v. Bithazey*, a case of *Nosworthy v. Maynard* was mentioned, where the security being defective, the cause stood over, and the plaintiffs filed a supplemental bill and prayed a sale.—A sale is at all times much preferable to a foreclosure, as abating the tedious process of the latter, it is liable to be re-opened during the space of twenty years, on grounds which are sometimes trivial, often expensive, and always vexatious. If the mortgagee foreclose the equity of redemption, sells the estate, and sues on a collateral security for the deficiency, he will, we have seen, (*ante*, 1002, et seq.) open the foreclosure, and by that means allow the mortgagor an opportunity of moving for further time to redeem, which may be enlarged almost without stint, and a second foreclosure, with considerable difficulty and much anxiety, at length obtained. It was therefore forcibly though ineffectually argued, in a late case, that the advantage was too much in favor of a mortgagor; who, though he could stop the suit upon a bill of foreclosure *in limine*, was, by a liberal indulgence, in addition to the necessary delay in the usual course of proceeding, furnished with the means of keeping the mortgagee out of his money at the hazard of all the inconvenience, and even the ruin that might be the consequence. *Perry v. Barker*, 15 Ves. 202. As a general rule, the court will not decree a compulsory sale. The mortgagee may have a foreclosure, but he cannot have a sale without the consent of the mortgagor, except in the following instances; 1st. Where the estate is deficient to pay the incumbrance, *ubi supra*. 2d. Where the mortgage is of a dry reversion, *ante*, 1014. 3d. Where the mortgagor dies, and the reversion descends on an infant,

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Sale may be prayed on supplemental bill, when.

for the bill to be taken *pro confesso* (T 2); and the counsel for

ante, 982. 4th. Where the mortgage is of an advowson, ante, vol. i. p. 198. 5th. Where the mortgagor becomes bankrupt, and then the mortgagee may pray a sale under Lord Rosslyn's general order, 4 Bro. C. C. 548. And, 6th. Where the mortgage is of an estate in Ireland. *Perry v. Barber*, ante, 1002, n. (1); et seq. and in all these cases, if a sale be not prayed in the first instance, it is presumed it may, in an additional bill.

But a tenant for life of an estate subject to a mortgage, cannot ask to have the estate sold. His only resource is to pray a redemption, and put himself in the place of the mortgagee, per Lords Hardwicke and Camden, 3 Swanst. 208. 219.

*Of opening
biddings.*

It is *rexata questio* under what circumstances biddings at a sale under a foreclosure decree will be opened. In a late case they were opened on motion made *before* the confirmation of the report was made absolute, notwithstanding the party applying attended the sale by an agent authorized by him to bid a limited sum on his behalf. Where the advance proposed was 500*l.* on a bidding of 8950*l.* it was considered to bear a sufficient proportion to the highest sum bid, so as to furnish no objection to the application on that ground. The consequence of opening the biddings in this instance was, that the estate was ultimately sold for 12,650*l.* *Pearson v. Collett*, 13 Price, 213. From the authorities on this head, the above learned reporter collects, that where there are special circumstances, it is discretionary with the Court, before the report is confirmed absolutely, whether they will or will not open the biddings, having regard as well to the principle that property sold under its decree shall be as productive as reasonably possible on the one side, as that the utmost certainty (consistent with that object) may be secured to purchasers on the other in having a binding contract, citing *Ryder v. Earl Gower*, 6 Bro. Parl. Ca. 306. 2d ed. Toml. *White v. Wilson*, 14 Ves. 152, 3; and *Baillie v. Chaigneau and others*, 6 Bro. Parl. Ca. 313, 2d ed. per Toml.

Where the report *has not been absolutely confirmed*, the court has opened the biddings almost as of course, but, this is wholly within the discretion of the court. The principal difficulty has usually been, the doubt whether the proportion of the sum proposed to be advanced to the highest sum bid, has been thought sufficient; but that has frequently varied. At one time *ten per cent.* as a sort of general rule, was considered and received as bearing a fair proportion, where the highest sum bid at the sale was not small. In one case an advance proposed of 150*l.* on a bidding of 5020*l.* was refused, the Lord Chancellor saying that he would not open the bidding in that case for a less over-bidding than 500*l.* *Anon.* 1 Ves. jun. 453. In another case, *Anon.* 2 Ves. jun. 487, biddings were opened where 100*l.* had been offered in advance upon a bidding of 800*l.* and a motion for that purpose was refused where the same sum was offered on 1200*l.*, but 200*l.* being offered, it was granted. 13 Price, 216, 17, where the subject is treated of in a very perspicuous note, *Rex v. Hilton*, 1 M'Lel. 595.

(T 2) A bill cannot be taken *pro confesso* until the defendant has been served with the subpoena, for until then he is not before the court. If a mortgagor departs *infra quatuor maria*, the mortgagee cannot foreclose, but must

the plaintiff prayed a decree for sale instead of a foreclosure, because the security was defective, and if they should afterwards sue the defendant on his bond for performance of covenants, that would open the decree for foreclosure, and he insisted that such decrees were usual. But his Honor said, that he never had known any; but that where the security was defective, it was often indeed referred to a Master to set a valuation on the estate, and the plaintiff was to take it *pro tanto*. But in this case he decreed a sale, because the decree was that the bill should be taken *pro confesso*, and not according to the prayer of the bill (v).

be content to obtain possession and open a mortgage account of the rents and profits.

(U) With respect to sequestrations for contempt, which are in the nature of executions at law, the following case lately occurred. On the 7th of April, 1814, a commission of sequestration issued against the defendant, directed to certain commissioners, commanding them to enter upon all the lands, tenements, and real estate of the defendant; and to collect into their hands not only the rents and profits of the said estate, but also all his goods and personal estate, and retain the same until the defendant should pay the sum of 9,869*l.* into the bank, clear his contempt, and the court should make an order to the contrary. The acting commissioners seized into their hands the whole of the defendant's estates; whereupon petitions were presented by two separate mortgagees of the estate, praying that the rents received by the sequestrators might be applied in discharge of the interest on the mortgages, and that the mortgagees might be let into possession. The only question in dispute was, whether the mortgagees were entitled to the rents received by the sequestrators prior to the Master's report, finding so much due to the mortgagees respectively for principal and interest; and it was contended, that the rents were not so applicable, on the ground that a sequestration was in the nature of an execution at law. The Vice Chancellor said, the rents and profits in this case received by the sequestrators were not vested in the plaintiff (the person on whose behalf the sequestration was awarded), but were in *custodia legis*; and there must be a further order before they could be applied for the benefit of the plaintiff; and if parties in the mean time came in, as the petitioners had done, and shewed to the court that the estate was mortgaged to them, they were entitled to the rents and profits in part discharge of what was due to them upon their mortgage, after paying thereout the sequestrators their costs, and the costs of the present application; and the sequestrators must give up the possession of the estate to the mortgagees. *Walker v. Bell*, 2 Madd. Rep. 21. See also *Fawcett v. Fothergill*, 1 Dick. 99. *Bowles v. Parsons*, ib. 142, and *Adams v. Claxton*, 6 Ves. 228, where it was held, that parties claiming a mortgage on sequestered estates must come to be examined *pro interesse suo*.

Sequestrator will be ordered to pay rents received to mortgagee, and give up possession to him if required.

[1017]

Foreclosure and redemption distinguished as to taking.

It seems to have been formerly doubted whether, where there is a debt secured by mortgage, and also a bond debt due from the same person, and the mortgagee exhibits his bill to be redeemed or foreclose, the mortgagor may redeem without discharging the bond debt, as well as that by mortgage; but I apprehend this doubt is totally removed by the modern decisions upon the subject (*l*). It arose from not attending to the distinction, between an application from the mortgagor to redeem, and one by the mortgagee to foreclose; for we are to observe, that the reason on which that opinion had prevailed in courts of equity, on application made by the mortgagor to redeem, was, because he who wishes to have equity rendered to him, must render it to those against whom he applies for it.

Mortgagor redeeming, must pay bond debt. Contra, if mortgagee foreclose (4).

Thus, if a mortgagor, after having forfeited his estate in law to the mortgagee, by neglecting to perform the condition to which he had made it subject, applied to equity to enable him to redeem, it was thought just, that when equity interfered to take from the mortgagee the estate, which by law was become absolutely vested in him, care should be taken that the mortgagee was not prejudiced by its interposition; which, viewing a mortgage as a complex transaction, and not simply as a debt, it would be, if other debts that he had let the mortgagor contract, perhaps, in some degree, under confidence that they would be covered by his former security, were left undischarged. But there is no pretence for the interposition of this maxim, where a mortgagee comes to foreclose; for his intention is to shut out the mortgagor from *his* equity, and strictly to enforce *his own* legal title. In such case therefore, the mortgagee electing for himself, and choosing to have a strict performance of the contract, the only equity which he is entitled to against the mortgagor, seems to be, to be decreed exactly that which the law would give him, and for which he hath stipulated, namely, the *land* or the *mortgage-money only*.

[1018]

(*l*) Vide ante, [vol. i. 347, 351.—
Ed.]

(*ll*) [See infra, pages 1019, 1021,
in *notis*.—Ed.]

And it seems to have been so determined, in the case of *Sharpnell v. Blake* (m), which, as to the point in question, was thus: B. being seised in fee of a copyhold estate held of the manor of ———, upon the 5th of October, 1725, made a conditional surrender of it to the plaintiff S. to secure 400*l.* and interest, and afterwards borrowed 50*l.* of S. upon bond. Then B., by two surrenders (the first dated 26th May, 1733, the other 27th May, 1734) mortgaged his estate to the defendant T. for 600*l.* The 29th of August, 1734, B. becomes a bankrupt. Some time in October following S. delivered ejectments against the tenants to get possession of this estate. Upon 30th October, the defendants T. and H., as assignees, gave S. notice that they would pay him his money due upon the mortgage, the 11th November following. Upon the 6th November, 1734, S. not having attended at the time and place appointed to receive his money, filed his bill for a foreclosure. T. brought a cross bill to redeem B.'s mortgage, upon payment of principal and interest: S. the defendant in the cross cause, insisted upon being paid the bond-debt of 50*l.* as lent upon security of the mortgage; for that, at the time of lending it was so agreed and charged that T.'s mortgages were only colourable and fraudulent, to cover the estate from debts. T. was B.'s son-in-law, and had made no proof, in the cause, of the payment of the pretended consideration-money for the two mortgages; but the Lord Chancellor held, that this bond-debt could not possibly be tacked to the mortgage.

First mortgagee lends money on bond, and files bill for foreclosure. Second mortgagee files cross bill to redeem, bond not tackable to mortgage.

And his Lordship, in delivering judgment upon this case, observed, that it had been settled, that a mortgagee might insist upon being paid a bond debt *against* the mortgagor (x);

(m) *Sharpnell v. Blake*, 2 Eq. Ca. Abr. 603, pl. 34.

(X) The report reads thus:—"By all the late cases, a mortgagee can insist upon being paid a bond debt, even against the mortgagor himself; and it is still stronger against a second mortgagee, or assignees of a commission of bankruptcy; and in the latter case, the creditor is not entitled to the whole debt, but ratably and proportionably with the rest of the creditors." The whole of this sentence, to say the least of it, is very confused, and even contradictory. A mortgagor coming to redeem, may pay off the mortgage without the bond. See ante, vol. b. 348, in the text. And it is clear that where a

Bond not tackable to mortgage against mortgagor or creditors.

that the case was still stronger *against* a second mortgagee or assignee of a commission of bankruptcy (n); and that there must be an inquiry before the Master, or by directing an issue, whether any money was lent upon these mortgages, in order to determine to whom the equity of redemption belonged, *vis.* whether to the assignees, or to the plaintiff in the cross cause in his own private right. The decision, as to tacking the bond debt is not reconcileable to the observation made by the Chancellor, on any other ground, than that of S.'s being plaintiff in the bill to foreclose; that seeming to be the only difference, in his Lordship's mind, between this case, and the case cited by him as settled; the right between the puisne mortgagees and the assignees remaining undetermined (Y).

(n) Quære, et vide ante, [vol. i. 353.—Ed.]

mortgagor has assigned his equity of redemption in trust to pay his debts, the mortgagee cannot tack his bond to his mortgage, but must come in with the other creditors *pro rata*, as to the bond, ante, vol. i. 287, 8, n. (O). The same may be said of assignees under a commission of bankruptcy, though no case directly decides that point. The above passage, therefore, cannot now be received; but a slight alteration would restore both the law and the sense. Thus, if the word "even" were altered into "not" or "not indeed;" the obvious contrariety between the former and latter limb of the sentence would then be reconciled.

Distinction in text untenable.

(Y) In answer to the claim of tacking, it was merely necessary to say that there were creditors, against whom the mortgage could not tack his bond to his mortgage, but must come in *pro rata* with them under the commission as to the bond debt. See the preceding note. It was not necessary, therefore, to refer the above distinction between a bill of foreclosure and a bill to redeem, and it is observable, that the court itself did not allude to any such distinction. The learned author first supposes a point of difference, and then by an extremely forced construction, presumes that the court proceeded upon it, saying, that the decision is not reconcileable with former observations of the court on any other ground. But it has been shewn, that other substantial grounds existed; and it should be recollected that the Judge came to no decision on the subject, but merely directed an inquiry to whom the equity of redemption belonged. The learned author is therefore without authority for this distinction; and it should be noticed that the cases lean entirely on the other side, disregarding the above supposed difference, and tending to establish the principle, that a mortgagee, in foreclosing an heir at law, may tack his bond to his mortgage, if by so doing he will injure no other creditors. Many instances have occurred where the mortgagee has filed a bill of foreclosure and claimed a right to tack a bond debt to his mortgage, and it has been disallowed, not because it was on a bill of foreclosure, but upon other merits,—as that a bond debt was not tackable to

Mortgagee foreclosing heir, may tack bond to mortgage.

This distinction, between cases where the application to equity is made by the mortgagor, and cases where it moves from the mortgagee, is analogous to a rule laid down on occasions not very dissimilar, namely, where equity is required to carry the debt beyond the penalty of a bond (o); for where the plaintiff came to be relieved against the penalty of a bond, it was so decreed, upon payment of the principal, interest, and costs, though they exceeded the penalty; and the decree was affirmed upon an appeal to the House of Lords. So, where lands were extended on a statute of judgment (p), at much less than the real value, and the conusor came into equity, to make the conusee account according to the real value, he could not be relieved without paying all that was due for principal, interest, and costs, although they exceeded the penalty; but where the vendor of lands entered into a recognizance of 1000*l.* for quiet enjoyment, which was forfeited (q); though the loss the vendee sustained was much greater than the

Bond restrained within penalty, where suit is by obligee, but extended beyond it, (when necessary) if application be by obligor (oo).

(o) 1 Eq. Ca. Abr. 92, pl. 10. Show. P. C. 15. [S. L. *Atkinson v. Atkinson*, 1 Ball & Bea. 239.—Ed.]

(oo) [The numerous cases on the subject of carrying interest beyond the penalty of a bond, cited in the note (O), ante, vol. i. p. 355, do not support the above distinction, nor in any

of them was the above doctrine even remotely hinted at.—Ed.]

(p) 1 Eq. Ca. Abr. 92, pl. 8. 1 Vern. 350. [S. L. *More v. M'Namara*, 1 Ball & Bea. 309.—Ed.]

(q) *Bidlake v. Arundel*, 1 Ch. Rep. 95.

a mortgage against the mortgagor or against creditors, or that a simple-contract debt was not tackable to a mortgage. See *Price v. Fastedge*, Amb. 685. *Hamerton v. Rogers*, 1 Ves. jun. 513. *Newby v. Cooper*, Finch, 379. In all these cases the bill was for a foreclosure, and the above distinction was not alluded to, when, if it were a sound distinction, it would have decided the cases at once, without the necessity of recurring to other grounds. The next note will shew, that the doctrine of the text does not prevail to prohibit the tacking of a judgment to a mortgage, where the bill is for foreclosure; and it may with equal reason be asked, why it should prevent the mortgagee from tacking a bond debt to his mortgage, if no other reason intervenes to prevent him. Is there any equitable principle which tends to discourage the recovery of what has been in good faith advanced? or if it be admitted, that on a bill to redeem, the mortgagee may insist on the tacking of his bond to his mortgage, is there any sound reason why, on a bill to foreclose, he should be deprived of that right when, by allowing it, no other person would be injured? On principle, therefore, it is submitted, that the learned author's distinction in the text, is without foundation.

[1020*]

penalty, yet, upon application by him, the court would not go beyond it. And where a trustee of a recognizance released it (r), without any consideration, upon a bill by the *cestui que trust* against the trustee, the court decreed him to pay the principal and interest, so as it exceeded not the penalty. And even (s), where a settlement or devise was made of lands for payment of debts, and there was a bond debt, the interest of which had over-run the penalty; although such conveyance for payment of debts are construed favorably, yet the creditor, on a bill brought by him, was restrained within the amount of the penalty. The reason why this indulgence is given, on applications by the obligor, and uniformly objected to, on suit of the obligee, is because the obligee has chosen his own security, and made himself judge what recompence he shall have, in case there be a breach in performance of the agreement (t); and therefore there is no equity to enlarge or better his security: but where the obligee is defendant, he is entitled to all that is due, before any equity can arise in the obligor. So, in the principal case, the mortgagee having contented himself with a bond for the latter money lent, there is no reason to better his security, by tacking it to the mortgage, and making it a lien on the land, which he might himself have done, had he thought proper, either by a new mortgage or an indorsement upon the old one.

On bill to fore-
close, mortgagor
may redeem
without paying
judgment or re-
cognizance.
Semb. (z).

And, I apprehend, that the law would be the same, although the subsequent debt were by judgment or recognizance; for such creditor cannot be called a purchaser, nor does he lend his money upon the immediate view or contemplation

(r) *Jones v. Bruck*, 1 Vern. 342.

(t) 3 Bac. Abr. 450.

(s) *Ann. 1 Salk. 154.*

*Mortgages
foreclosing,
may tack judg-
ment to mort-
gage.*

(Z) The learned author's doctrine here, as well as that alluded to in the preceding note, is without support from either principle or authority. It has uniformly been disregarded, and consequently has not been over-ruled, as observed upon in any printed report, in express terms. In a former note (ante, vol. i. p. 525, n. (W)), the case of *Baker v. Morris* is introduced, where Sir W. Grant, M. R. held, that when circumstances arise in which the doctrine of tacking takes place, the judgment or statute tacked to the preceding mortgage becomes as much part of the mortgage as the sum originally lent, and is to be considered as equally secured by it. In that case, the bill was against

of the cognizor's real estate; and though the cognizee has thereby a lien upon the land, yet that arises from the operation of law, and not from any specific agreement between the parties; and therefore, if the principle before stated, *viz.* that on a bill to foreclose, the mortgagor may redeem on performing his original contract, *viz.* by payment of the mortgage money, without having any other terms put upon him, be true, the mortgagee will be left, as to his judgment, to his remedy at law.

Where the mortgagee brought his bill to foreclose the defendants (u), if the money was not paid in a reasonable time, and a decree was made by default, and it was prayed for the plaintiff, that, in case the defendants redeemed, the plaintiff might be decreed not only his costs at law, of an ejectment, which he had brought to recover the possession, and in the then cause, but likewise in a cross cause brought by the defendants, and then depending: The Master of the Rolls refused to decree him the costs of the cross cause, because he could take no notice, that there was such a cause depending, and the plaintiffs in that cause might proceed, and prevail; and if they did not go on, the cause might be set down *ad requisitionem defendantis*, and he would have costs. But the counsel for the plaintiff said, that the decree then would be only personal, and they should have no security for their money, and the plaintiffs in that case might be beggars, and insisted they were entitled to all costs they were put to by this mortgage, and quoted a case at law, which he said was much stronger than this, where the court would not relieve against the penalty of a bond, till the obligee paid the costs of the

Mortgagee allowed costs of ejectment and foreclosure, but not costs of cross cause on bill filed by defendants, who might prevail or not (A).

[1022]

(u) *Anon. Mos. 45. [S. C. 2 Mod. 174.—Ed.]*

assignees of a bankrupt for foreclosure: they offered to redeem on paying the mortgage only, without the judgment, contending that, as to *that*, the mortgagee should come in with the other creditors *pro rata*. But Sir W. Grant decided (passing by the circumstance that the bill was filed by the second mortgagee, to be redeemed or foreclose) that the judgment was tackable to the mortgage. See 16 Ves. 397.

(A) The subject of costs has been amply discussed in a former note; see ante, p. 991, n. (D). The above case is not very intelligible; little can be deduced from it.

former trial, in which the obligee had been nonsuited. But no more was said (B).

Mortgages must bear expence of completing title after foreclosure.

(B) On the subject of foreclosure these few remarks are relevant:—
1st. When the mortgage has been foreclosed, any expence which the mortgagee may afterwards sustain, must be borne by himself; for the foreclosure operates as a new sale and purchase. Where therefore it appeared, that after foreclosure, a surrender was necessary to complete the title of the mortgagee, the defendant was decreed to surrender the mortgaged premises (which were copyhold) at the expence of the plaintiff, the mortgagee. *Hill v. Price*, 1 Dick. 344.

No foreclosure against crown.

2d. In *Reeve v. Attorney-General*, 2 Atk. 223, cited, Lord Hardwicke said he remembered a case in the court of Exchequer, when he was attorney-general, in which Mr. Lutwich, the counsel, was the plaintiff: his father had a mortgage in fee on Sir W. Perkin's estate, who was attainted for high treason on account of the assassination plot. Mr. Lutwich brought his bill to foreclose, and made the attorney-general a party; the court would not decree a foreclosure against the crown, but directed that the mortgagee should hold and enjoy the mortgaged premises till the crown thought proper to redeem the estate. Vide *Pawlett v. Attorney-General*, Hard. 465; and ante, vol. i. p. 309, text, and note (H).

Foreclosure cannot be set down as a short cause.

3d. A bill of foreclosure cannot be set down as a short cause unless by consent. *Rushleigh v. Dayman*, 2 Madd. Rep. 147. In this case Mr. Lovat, of counsel for the defendant, said, he had been informed, that in a recent case of *Williams v. Williams*, in the Exchequer, before Lord Chief Baron Richards, it was held that such a suit could not be set down as a short cause, unless by consent; and Mr. Simpkinson and Mr. Treslove, who were opposed to him, vouched for the correctness of the statement.

Proof of execution of deed.

4th. Where A. mortgaged to B., and C. was the only witness to the execution of the deed, and B. died, bequeathing the mortgage to C. and wife, and others, who filed a bill of foreclosure against A. and subsequent incumbancers; proof of C.'s hand-writing by a third person was held by the Vice-Chancellor sufficient evidence of the execution of the mortgage made by A. to B. *Inman v. Parsons*, 4 Madd. 271.

5 Geo. 2. c. 25.

5th. In *Knowles v. Broome*, 1 Ves. & Bea. 305, time was enlarged for appearance to a bill of foreclosure under the statute 5 Geo. 2. c. 25—notice in the parish church having been prevented while it was under repair.

6th. If after a decree in a suit for redemption here, the mortgagee commences a suit for foreclosure in Jamaica, the proceedings in the latter suit will, upon certain terms, be restrained by injunction. *Beckford ats. ———*, MS. cor. V. C. November 4th, 1827.

CHAP. XXII.

OF OTHER MATTERS RELATING TO MORTGAGES (A).

A MORTGAGE works a severance of a joint tenancy.

Mortgage severs joint-tenancy (B).

Thus (a), where three persons were jointly interested in the trust of a term of years, and one of them mortgaged his third

(a) *York v. Stone*, 1 Salk. 158. S. C. 1 Eq. Ca. Abr. 293, pl. 1.

(A) This chapter contains, 1st, A case on the severance of joint tenancy by a mortgage.—2d, An inquiry whether the mortgage debt be transferrable by parol, from p. 1023 to 1030. It may be here observed, that a mortgagee is not a necessary party to a suit for partition, because he is entitled to the whole. *Stow v. Stow*, 8 Price, 518.—3d, A few cases on the subject of powers, p. 1031 to 1034.—4th, A reference to voluntary mortgages, p. 1034.—5th, Observations on the estate and interest of the mortgagor, p. 1036 to 1040.—6th, An explanation of the necessity of executing an assignment of a mortgage on the land, p. 1040.—7th, The rule as to appurtenances and fixtures, p. 1040 to 1041.—8th, A case on the release of an equity of redemption *pendente lite*, p. 1042.—9th, A statement of the effect of a purchase of an equity of redemption by two mortgagees, p. 1043.—10th, An expression of the rule where there is a particular tenant and remainder-man of the mortgage-money, and the debt is paid in, p. 1043.—11th, A decision on the exoneration of funds between the mortgagor's heir and executor, p. 1043.—12th, The effect of a fine levied after the time stipulated, and a second declaration of the uses, p. 1044.—13th, A statement of the *cestui que trust's* responsibility for the trustees' safe custody of the pledge, p. 1044, 5.—And, lastly, an allusion to the manner of pleading a mortgage, and of evidence and costs in over-ruling a plea, p. 1046, to the end.

Contents of chapter.

(B) See also ante, vol. i. p. 18, n. (B). But though a mortgage, which is a partial alienation, will operate as a severance of that odious thing in law—a joint tenancy; yet a mere charge by one joint tenant will not affect his companion who happens to be the survivor; for the maxim is, *ius accrescendi præfertur amicis*. Co. Lit. 185 a. Therefore, if one of two joint tenants grant a rent charge by deed out of that which belongs to him during his life, the rent charge will be effectual; but, after his decease, it will be void: for he who hath the land by survivorship will hold it discharged, because he is in by survivorship, and claims under the original feoffment, not by descent from his companion. Lit. sec. 286. So, if one joint tenant acknowledge a recognizance, or a statute, or suffers a judgment in an action of debt to be entered up against him, and dies before execution had, it cannot be executed afterwards; but if execution be sued in the life-time of the coensor, it will then

Joint-tenant cannot charge, though he may mortgage his share.

part; the question was, whether the joint tenancy was severed in such case? And it was compared to the case of a *will*, which, as we have seen, is revoked *pro tanto* only by a mortgage. But Cowper, Lord Chancellor, held, that a joint tenancy was an odious thing in equity; that as to the case of a will, it might be for the benefit of a mortgagor that his will should not be revoked, but that it was to the disadvantage of the mortgagor, who died first, that a joint tenancy should continue; because all his estate and interest went from his representatives to the survivor, unless it were construed a severance.

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Whether mortgage debt will pass by parol gift of deed (c).

In the case of *Hassel v. Tynte* (b) a question arose, whether a mortgage could pass by gift by *parol*? There, Lady Tynte, being entitled to a sum of 1000*l.* secured by a mortgage upon a real estate, taken in the name of Frances Hales; and being old, and afflicted with a disorder, of which she died about six weeks afterwards, delivered the deeds and writings, relating to the mortgage and estate, to Hassel, in the presence of several witnesses, one of whom proved that she made use of this expression at the time, *viz.* "I deliver this as my act and deed." Proof was also read of a declaration by Lady Tynte, and particularly one Adderley deposed, that subsequent to the delivery of the deeds, Lady Tynte said she hoped that Hassel would be a good girl, for that she had given her a mortgage of 1000*l.* for her own immediate use and benefit. On Lady Tynte's death, a bill was filed by Hassel *inter alia*, to have the benefit of this gift. Several questions were made. First, whether this was a *donatio mortis causa*? Secondly, whether

(b) Amb. Rep. 318.

bund the survivor. *Abergarny's case*, 6 Co. 78. But Lord Coke observes, that if he who makes the charge survives, it will be good for ever. Co. Lit. 184.a.

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(C) This has been treated as a difficult question by the present Lord Chancellor, in *Mantham v. Corporation of Bedford*, 17 Ves. 390, without, however, any reference to the perplexity of the case, or to the learned author's very sensible argument for the negative solution of the problem contained in this and the thirteen succeeding pages. Sir S. Toller also treats it as a doubtful point. Toll. on Exem. 236, 4th edition. One reason, and perhaps a principal one, why it cannot so pass, is, because the security itself cannot pass with it neither as an incident nor *per se*. *Infra*, 1028, a.

it was a *donatio inter vivos*? Thirdly, whether it being a gift of a mortgage upon a real estate, it could take effect, or was not void by the statute of frauds and perjuries? Lord Hardwicke said, that the question on the statute of frauds and perjuries was of great delicacy and nicety. Very slight evidence of the gift had been given by one of the witnesses; the other proved the words made use of at the time; but it was difficult to know what construction to put upon them; whether Lady Tynte intended to deliver them to the plaintiff to keep for her. The proof of the declarations seemed to clear up her intention. As to the question, whether it was *donatio mortis causâ*, it looked more like *donatio inter vivos* (D). But there was such [1025] a sort of *donatio mortis causâ* mentioned in the civil law; but, whether it were the one or the other, the question was, if allowable by the statute of frauds? Perhaps, it would be more favorable to consider it as *donatio mortis causâ*. But it partook something of the nature of a will.

No case had been cited but that of *Richards v. Sims* (c), which came on in a very different shape from the present. It was on a bill by an administrator, to have the deeds and writings relative to a mortgage delivered up, and to be redeemed. The defendant insisted upon a *donatio mortis causâ*. Two issues were directed. First, whether the party gave the defendant the deeds? Secondly, whether he declared that he forgave the debt? Both the issues were found in favor of the administrator; so that it was but a very slight precedent.

(c) Vide this case cited ante [vol. I. 144, first line in text.—Ed.]

(D) *Donatio mortis causâ* is not, in strictness, a legacy, but in the nature of a legacy; and it is not necessary to be proved with the testator's will, but it operates as a declaration of trust upon the executor. Gifts of this kind are not good, unless made by the party in his last sickness, and delivered by him or by his order. *Miller v. Miller*, 3 P. Wms. 357. *Larson v. Larson*, 1 ib. 441; and *Blount v. Burrow*, 1 Ves. jun. 546. As an instance of this species of bequest, it has been held, that if a husband upon his death-bed delivers to his wife a purse of a hundred guineas, and bids her apply them to her own use, this will be *donatio mortis causâ*, and effectual, and will not go to the executor or administrator of the husband, if there be sufficient to pay debts without it. 1 P. Wms. 441. See also 2 ib. 356, a similar case. See further, the next note.

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continued.

Donatio mortis causâ.

What had been argued at the bar was very true, that the money was the principal, and the land only the security; and that the money would pass by will not attested according to the statute (cc); and yet here was an interest in land; and it was a very considerable question, whether it could pass by parol? His Lordship was very unwilling to give his opinion upon it, and it was not then necessary, and therefore, at all events, he should reserve the consideration of this question.

No subsequent occasion which I have met with has called for a decision of this question. As to the validity of a parol gift of a mortgage, the importance of which, when it shall arise, is sufficiently evident, if we consider how great a portion of the real and personal property in this kingdom depends upon mortgages, I shall offer to the reader some observations on the subject of a mortgage of land or stock being disposed of by gift.

Gift must be accompanied with actual delivery.

[1026]

Among the various methods of alienating and acquiring property in things, recognized by the common law of England, we find that by *gift*, which is distinguishable from other modes of alienation and acquisition by the circumstances, that it is gratuitous, depending upon mere generosity, and not founded on an equivalent, and that the translation of property in this mode can be affected only by the *actual delivery* of the thing alienated; for although strictly speaking, and on abstract notions of property, the declaration of the will of the owner to alienate any thing, is sufficient for transferring his property therein to the person in whose favor that will has been plainly intimated; yet such declaration of the will merely is not binding in the law of England, so as to vest a possession, or even impart a civil right of action. But if a man delivered a thing with a design of transferring the property of it, this, before the statute of frauds and perjuries, was sufficient, in our law (in which respect it is conformable with the law of nature, and the civil law) for transferring a full right of property, and vesting it in the alienee.

(cc) [As to this, see ante, vol. i. 427 and 431, in *notis.*—Ed.]

Accordingly, Sir William Blackstone (*d*), in speaking of a feoffment, says, that it may properly be defined the gift of any *corporeal* hereditament to another; and by feoffment, which the ancient writers called *donatio* (*e*), lands and tenements, which lie in livery, might have been passed by livery, by deed or without deed; and Lord Coke observes, that *do* or *dedi* is the aptest word of feoffment. But, since the statute of frauds, no direct gift can be made of any interest in real estates for a longer period than three years, nor of any trust therein of longer duration, without writing, *unless the trust arises by operation of law*.

Since statute of frauds land not passable by parol, except for three years.

But a gift of personal things may still be made by word of mouth, attested by sufficient evidence, of which Sir William Blackstone says, "the delivery of possession is the strongest and most *essential*." And so it is laid down in Jenkins's Centuries (*f*), "that a gift of any thing without a consideration is good, but it is revocable before the delivery to the donee of the thing given. *Donatio perficitur possessione accipientis*." And agreeable to this Sir William Blackstone, in defining a gift, says, "a *true* and *proper* gift is always accompanied with *delivery* of possession (*g*), and takes effect immediately. *But if the gift does not take effect by delivery* of immediate possession, it is then not then properly a gift, but a contract; and this a man cannot be compelled to perform, but upon good and sufficient consideration." In the latter observation, Sir William Blackstone differs from Grotius, who considers a gift as an act of a different species from a contract; for Grotius says, "all acts, advantageous to others, *except those which are of mere generosity*, are called contracts (*h*)," and that, "in all contracts Nature demands an *equality*." But it is immaterial to our question, whether a gift, not accompanied by a delivery, be or be not a contract, if being a contract, it still is of a nature which does not impart a *strict* right, by which the giver may be *forced* to perform his engagement.

Contra of personal things capable of delivery.

(*d*) 2 Bla. Com. 310.

(*g*) 2 Bla. Com. 441.

(*e*) Co. Litt. 9. a.

(*h*) Gro. Book 2. cap. 12, s. 7.

(*f*) Jenk. Cen. 109.

Gifts distinguished.

Gifts or donations are of several kinds, but there are two species immediately obvious. Gifts or donations *inter vivos*, and gifts *mortis causâ*. The nature of the former I have already pointed out. A gift of the latter kind, namely, a gift in consideration of death, is (according to Swinburne's definition) where a man, *moved with the consideration of his mortality*, doth give and deliver something to another, to be his, in case the giver die; or otherwise if he live, he to have it again.

Three kinds of gifts mortis causâ.

Of gifts in the case of death, there be three sorts (i). One when the giver, not terrified with fear of any present peril, but moved with a general consideration of man's mortality, gives any thing. Another, when the giver being moved with immediate danger, doth so give, that straightways, it is made his to whom it is given. The third is, when any being in peril of death, doth give something, but not so that it shall presently be his that received it, but only in case the giver die. The two former of these kinds of gifts, if the giver do not make express mention of his death, are reputed simple gifts, and so cannot be revoked, but take full effect from the time of making the gift; but the latter is of a qualified nature, depending upon the death of the party.

Delivery indispensable in each.

But in donations *mortis causâ* (k), as well as donations *inter vivos*, delivery seems to be a necessary and indispensable incident (E).

(i) Swinb. 22, 23.

Drury v. Smith, 1 P.Wms. 404. *Ward*

(k) *Ashton v. Dawson*, Sel. Ch. Ca.

v. Turner, 2 Ves. 431.

14. *Jones v. Selby*, Pre. Ch. 300.

Delivery of what things will perfect gift mortis causâ.

(E) A delivery of stock receipts is not a sufficient delivery to effectuate a *donatio mortis causâ* of the stock itself. Such a gift of stock cannot be made without a transfer, or something equivalent. *Ward v. Turner*, 2 Ves. 444. 431. But delivery of the key of a warehouse, or of a trunk, is considered as a delivery of the contents of the warehouse and trunk for this purpose, *ib. et vide Tate v. Hilbert*, 2 Ves. jun. 116. S. C. 4 Bro. C. C. 291. So delivery of a bond with these words, "there, take that and keep it," in the last sickness of the donor, he dying two days after, has been held *donatio mortis causâ*; and the donee was declared to be at liberty to use the executor's names in suing on the bond, he indemnifying them; and the costs of the suit were directed to be paid out of the testator's estate. *Gardner v. Parker*, 3 Madd. Rep. 184. But

As a delivery is an incident indispensably necessary to a gift or donation, it follows, that nothing can be the subject of it which is not *capable* of being delivered, and therefore the solution of this question, whether a mortgage of lands or stock can be

Neither mortgage debt (which is chose in action) nor security (which affects lands) transferrable at law by gift.

these gifts must be in contemplation of immediate death, *Bunn v. Markham*, 2 Marsh. 532; and a most clear and satisfactory case must be made out. 1 Jno. Wils. 449. Actual delivery seems also requisite to perfect this description of gift. Thus, where a person supposing himself in *extremis*, caused India bonds, bank notes, and guineas to be brought out of his iron chest, which he ordered to be sealed up, and endorsed with these words "for Mrs. and Miss P." and then directed them to be re-placed in the iron chest, the keys of which he directed to be delivered to his solicitor (who was one of his executors) after his decease, it was held this was no *donatio mortis causa* for want of a sufficient delivery, and for that the testator continued in possession. *Bunn v. Markham*, supra, S. C. 7 Taunt. 224. The delivery of bank notes under these circumstances will pass them. *Snellgrove v. Bailey*, 3 Atk. 214. S. C. mentioned, 2 Ves. 442. *Walter v. Hodge*, 1 Jno. Wils. 445. S. C. 2 Swan. 92, where a mortuary gift of bank notes were refused, not on account of the substance of the gift, but for want of evidence. It is said, however, that bills of exchange, promissory notes, or checks on bankers, are incapable of being the subject of *donatio mortis causa*, they being only evidence of a contract. Toll. Exors. 183, and 1 Rep. Leg. p. 1—6.

[1028 *]

There are two ways by which property may pass without writing, either as a *donatio mortis causa*, or by a nuncupative will according to the forms required by the statute. The distinction between a *donatio mortis causa* and a nuncupative will is, that the first is claimed against the executor, and the other from the executor. Where delivery will not execute a complete gift *inter vivos*, it cannot create a *donatio mortis causa*, because it will not prevent the property from vesting in the executors; and, as a court of equity will not, *inter vivos*, compel a party to complete his gift, so it will not compel the executor to complete the gift of his testator. The delivery of a mortgage deed cannot pass the property *inter vivos*, first, because the action for the money must still be in the name of the donor; and secondly, because the mortgagor is not compellable to pay the money without having back the mortgaged estate which can only pass by the deed of the mortgagee; and no court would compel the donor to complete his gift. In a late case a person being possessed of a bond for 2,927*l.* and also of a mortgage for securing the same sum, on his deathbed when he was so ill as to be unable to write, but being at the time of sound and disposing mind, in the presence of three witnesses declared that he gave the bond and mortgage, and the money secured by them, to his daughter. A written statement of this declaration was forthwith made and signed by three persons in whose presence the declaration was made. Very soon afterwards, on the same day, and in presence of the same persons, the mortgage deeds and bond were produced to the testator, and he was told what they were, on which he desired them to be delivered into the hands of his daughter. They were accordingly delivered into her hands; and, whilst she held the deeds, he took

Donatio mortis causa.

Mortgage cannot be given mortis causa.

the subject of a gift, must depend upon another question, namely, whether it can be delivered? And in order to ascertain that, we must examine into what the ingredients are of which a mortgage is composed. A mortgage, generally speaking, is made up of a debt, and a pledge for securing it, each of which we have seen the law recognizes as separate and distinct from the other. The debt is clearly a *chose in action*.

her hands between his, in token of having completed the gift, and expressed satisfaction when he had done so. He died on the following day.—A question then arose whether the mortgage and bond passed by this gift as *donatio mortis causa*. The Vice Chancellor was at first inclined to think that, as the bond alone, if it had been the only security for the debt, would, under the decisions, have passed as *donatio mortis causa*, so it would draw after it the mortgage, as being a collateral security for the same debt; but, upon further consideration he thought that the delivery of the bond, where there was also a mortgage, could not be considered as a gift completed. The mortgagor had a right to resist the payment of the bond without a reconveyance of his estate; and it could not be maintained that the donor of the bond would be compelled to complete his gift by such reconveyance. The case of the *Duchess of Buccleugh v. Howe*, 4 Madd. 467, where he held that a gift by will of an English bond was a gift also of a Scotch heritable security for the same debts, did not apply to this case. There the single question was, whether the gift of the English bond was not, within the intention of the testator, a gift of the debt, and did not necessarily carry with it all securities for the debt. The question here was, not as to the intention to give, but whether the gift was completed. His Honor thought the gifts were not completed, and declared that there was no good *donatio mortis causa* of the mortgage in question even though it was accompanied by a bond. *Duffield v. Elwes*, 1 Sim. & Sta. 243. In the previous case of *Hurst v. Beach*, 5 Madd. 351, it had been ruled that the delivery up of mortgage deeds does not cancel the debt; but that the delivery up of such deeds, and of a bond given at the time of the mortgage for the purpose of releasing or acquitting the debt in case the donor should not recover from the illness with which she was then afflicted, is an effectual *donation mortis causa*. 5 Madd. 351.

Where a testator gave in her life-time to the plaintiff a promissory note to pay him or order "on demand, the sum of 100*l*. for value received and his kindness to me" with a verbal engagement on the part of the plaintiffs that the note should not be demanded until after her death; it was held, in an action upon the note, that parol evidence could not be received to shew that it was not given for a valuable consideration. And that such a note does not operate by way of testamentary disposition; nor is it void on the ground that it is a fraud on the legacy duty, that duty never having attached upon it, and there being nothing to shew that the amount passed by way of a *donatio mortis causa*. As to this point, see *Chitty on Bills*, pages 2. 72, 73, 6th edit. and *Holt C. N. P.* 21. and 10 to 13; *Bunn v. Markham*, 7 Taunt. 224. *Toller's Executors*, 232 to 237.

The security is land or stock, &c. vested in possession in the mortgagee. Now it is perfectly clear that the debt, being a *chose in action*, or right to recover what the debtor is under an obligation to pay, cannot in itself be the subject of a delivery, for it is an incorporeal thing, and corporeal things alone have the capacity of being actually delivered; nor is it transferrable by the law of England, being but a right of action vested in the creditor to recover his debt. It is equally evident that the possession of the security, if it be land, vested in the mortgagee, cannot be divested, since the statute of frauds, but by a formal conveyance in writing proper for that purpose; for a mortgage is a lien, and an estate in the land; and therefore, by a devise of land mortgaged, nothing passes in point of law, but the equity of redemption, if it is a mortgage in fee; if for years, the reversion and equity of redemption passes; and if it be stock, a formal transfer will be necessary to divest the possession out of the donor, and if the act done leaves the possession in the donor, it can take nothing out of him at law, nor in equity, unless it gives an equitable remedy on the foundation of a trust. Then as the debt, being a *chose in action*, is incapable of being transferred at law, and as an incorporeal right is not susceptible of delivery of the mortgage deeds, it must pass as an incident following its principal the mortgage; but the fact is otherwise, for the debt is the principal and the land the incident. But if that were not the case, and the security were the principal, it is clear a mere gift, with a delivery of the deeds without writing, would not divest lands or transfer stock at law. Therefore, at law, neither the debt nor the security, it seems to me, can be the subject of a gift or donation. [1029]

Then let us consider how the case will be in equity. It may perhaps be contended, that as a delivery of the title-deeds of an estate, or of mortgage deeds, by way of security, is considered as an equitable mortgage or assignment, so a delivery of such deeds, by way of gift, may amount in equity to a delivery of the thing given; but these cases turn upon distinct principles. It appears to me, that there can be no such thing as an equitable gift or donation, which is not also a legal gift or donation. When a court of equity considers a deposit of deeds

*Nor in equity.
Semb.*

as an equitable mortgage or assignment of a mortgage, it reasons by a circuit. It first considers the transaction as in the nature of an executory agreement or contract, by which the person who makes the deposit, makes himself a trustee for the person with whom he contracts, by operation of law, in consideration of an equivalent, and then enforces that trust as an implied trust, which is clearly out of the statute of frauds. But this reasoning does not apply where there is no equivalent; for there, if it be a contract, it is *nudum pactum*, and, for want of a consideration, gives no civil right which can be maintained in equity, though it may raise a moral obligation on the part of the donor to fulfil his engagement.

Gift of mortgage and bond distinguished.

The only case in which a court of equity seems to have given countenance to an equitable donation, *mortis causâ*, is that of *Baily v. Snelgrove*, cited in *Vesey (I)*, and determined by Lord Hardwicke in 1744, where a bond was given in prospect of death. The manner of gift was admitted, the bond was delivered, and it was held a good donation *mortis causâ*. But Lord Hardwicke gives his reasons for that determination in the case of *Ward v. Turner (m)*, and clearly distinguishes that case, and rests it on grounds peculiar to the nature of a bond; for he says, that though it be true that a bond, which is a specialty, is a *chose in action*, and its principal value consists in the thing in action, yet *some property* is conveyed by the delivery, for the property is vested, and to this degree that the law books say, the person to whom this specialty is given, may cancel, burn, and destroy it; the consequence of which is, that it puts it in his power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond without a *profert in curia*. Another thing (says his Lordship) which makes it amount to a delivery, is, that the law allows it a locality, and therefore a bond is *bona notabilia*, so as to require a prerogative administration, where a bond is in one diocese and goods in another. But even in this case Lord Hardwicke expresses his doubts, whether he had not gone too far. But the reasoning, in the above case, does not at all apply to the case of a gift of a mere mortgage with de-

[1030]

(l) 3 Ves. 441.

(m) 3 Ves. 451.

Every of mortgage deeds, for that clearly neither conveys a property, nor vests any interest, at law, in the donee; though the person to whom such mortgage deeds are given should cancel, burn, or destroy them, the estate mortgaged will still continue vested in the first mortgagee, and he may maintain an action of ejectment, and on proving the existence and destruction of the deeds, give parol evidence of their contents. And I should presume, that the debt being the substance, is transitory, and has nothing to do with the locality of the mortgage deeds.

Then if the case of a bond, though a *chase in action* stands upon its own bottom, and by no means turns upon the validity of a delivery of a *chase in action*; and the question as to a gift of a mortgage, by delivery of the mortgage deeds, be a new one, it is hardly to be presumed that a court of equity, had it the power, would *now* be inclined to show any favor to such disposition; because, so far as it is admitted, it will militate directly against the statute of frauds, and introduce all the mischiefs of nuncupative wills, both of which are strong reasons against supporting such gift upon the foundation of a symbolical delivery by delivery of the deeds. But should such court be so disposed, I should presume it would be under an incapacity of effecting its purpose; for upon revising the proceedings and developing the principles on which these courts act, it will be found that they have never assumed the power of dispensing with any of the incidents annexed to the alienation of property directly, which must be done to introduce the notion of a symbolical delivery in lieu of the *actual* delivery, *inseparably* incidental at law to a *gift*; nor have they considered themselves as warranted to controul the conscience of parties, except where trust, fraud, or accident, have given them jurisdiction over it, neither of which circumstances seem to me to occur in the case in question, which is merely an instance of an imperfect alienation, and resembles the case of a feoffment without livery of seisin; or will of real estate, not duly attested, neither of which can be aided in Chancery *.

Conclusion that gift mortis causa of mortgage not practicable.

[1031]

* [The contents of these pages in the 4th edition, having been previously introduced, it was deemed unnecessary to repeat them here.—Ed.]

General power to A. makes estate his, and renders it liable to his debts and mortgages (r).

Where there is a general power given or reserved to a person, to charge an estate with money for such uses, intents, and purposes as he shall appoint; it makes it his absolute estate, and gives him such a dominion over it as will render it subject to his debts, and consequently liable to discharge a mortgage, notwithstanding an appointment pursuant to the power.

Thus (r), where a settlement was made of copyhold estates by a father upon the marriage of his son, with a covenant that it should be free from any incumbrance; in consideration of which the son covenanted to re-convey part of the estate after the father's death, or to pay 300*l.* to such person as the father should appoint; the father had, a few days previous to the settlement, created an incumbrance of 300*l.* on the settled estates by mortgage; and afterwards he appointed the 300*l.* to his daughter and died; then the son brought a bill (among other things) to have the estate disencumbered of the mortgage. *Et per curiam*, the plaintiff has a plain equity to have the estate disencumbered of the mortgage, brought on it in fraud of the marriage agreement; then the question is, how far the 300*l.* charged on the estate disjunctively, is liable to indemnify the plaintiff? he is entitled to be reimbursed out of this 300*l.* and interest, if the father's estate is not sufficient. The son's covenant is part of the consideration moving from him, for the settlement made on him by the father, in fraud of which the incumbrance was made; and the question is, whether any person claiming from the father shall take back this estate of 300*l.* out of it, without letting the son, who was a purchaser, have the benefit of the same agreement; which would be contrary to rules of all agreements, that they must be performed on both sides. But it is said that this differs, because the in-

(r) *Troughton v. Troughton*, 1 Ves. 86. S. C. 3 Atk. 656. [The latter case, but the decision itself is little relevant to the subject of this treatise.—*Ed.*]

(F) In *Holmes v. Coghill*, 7 Ves. 499, this distinction was taken at the Rolls between a general power of appointment and absolute property, viz. that a power, unless executed, is not assets for debts, whereas the fee-simple of an estate may be made so by bill in equity, and this decision was affirmed on appeal to the Chancellor. 12 Ves. 206.

tent was to provide for the sister of the plaintiff by this 300%. who stood equally in the light of a purchaser for a valuable consideration as the plaintiff; and that therefore, although the father has broke the covenant, yet this shall not be taken from the daughter, who must be put upon the same footing as children, from whom nothing can be taken; but resort must be had to the assets of the person making the settlement; and that is true; but here the appointment to the daughter is a secondary consideration only, it being for the father's benefit, who might have directed it to be paid to a stranger; by whom it could not then be claimed by voluntary appointment from the father, letting this incumbrance remain. It was like the case of a purchaser discovering an incumbrance, who should retain so much for it, as remained in his hands: And this 300% being part of the consideration of the settlement, is in the same light. The father's other assets must be first applied, and if not sufficient, the plaintiff is entitled to retain the deficiency out of the 300% and the remainder only thereof ought to go to the appointee.

Where a power was given to raise money by mortgage, and exceeded in the execution, the Court of Chancery would not relieve the mortgagee, his adversary claiming under a valuable consideration. *Recital of creation of power essential to its valid execution (a).*

(G) It has been suggested, that this case of *Jenkins v. Keymis*, would at the present day be supported in equity, see ante, vol. i. 73, n. (R), and Mr. Sugden's opinion in his *Trea. on Pow.* p. 437, 2d edition. For other cases on the due execution of powers, see *Hixon v. Oliver*, 13 Ves. 114. *Blake v. Marnell*, 2 Ball & Bea. 35. *S. C.* 4 Dow. P. C. 248, and Butl. Co. Lit. 271, b. n. 1. s. vii. 2.

Whether a mere power to charge an estate with a certain sum, will authorize the appointment of an interest in the land, as for a term of years or otherwise, so as to confer a title to the legal seisin, has not yet been decided; but the general opinion is, that a person having a mere power to charge, cannot mortgage; the most he can do, being to charge the lands with the money, and leave it to a court of equity to enforce the security. The learned author appears to have been of a contrary opinion, ante, vol. i. p. 72, in the text; but the cases there cited in note (u) do not bear out the full extent of his position; and it is probable from the turn and wording of the sentence, that he did not intend to lay down a general rule, that a power to charge an estate with a specific sum will in every instance include a power of raising that sum by mortgage. This is true only of an unlimited power to charge (*Long v. Long*, *Power to charge when it authorizes power to mortgage.*

This point occurred in the case of *Jenkins v. Keymis* (a); there K. being tenant for life, remainder to his son C. K. in

(a) Hard. 395. 1 Lev. 150. 1 Ch. Ca. 103.

Distinguished from power to raise.

5 Ves. 445.) and not of a power to charge with a certain stipulated sum. Another essential distinction is, that though a power to charge with a particular sum will not enable a mortgagor; yet a power to raise a sum generally, will. Thus, where a testator after giving his estate to A. in tail, with remainder to B. in tail, with remainder to C. in fee, gave to his executor full power and authority to raise out of his estate 500*l.* for the use of his next heir, it was held that the executor had sufficient power to sell the lands, which of course included a power to mortgage them. *Wareham v. Brown*, 2 Vern. 153, et vide *Bateman v. Brown*, 1 Atk. 421. So where a sum was charged upon an estate for the benefit of the children "in such manner" as the survivor of husband and wife should appoint, it was held, that the words not only included a power of raising it by mortgage or sale, but also a power of fixing a certain determinate time for raising it. *Green v. Belchier*, 1 Atk. 507. And a power to sell for a particular purpose has been held to imply a power to mortgage, which is a conditional sale. *Mills v. Banks*, 3 P. Wms. 9. If therefore an estate be vested in trustees upon trust to sell, &c. without any express power to mortgage, yet a sale will be authorized; and this is confirmed by the doctrine that when a trustee for sale becomes also the purchaser, relief in equity is given to the cestui que trust on his paying to the trustee the money advanced with interest, thereby treating the transaction as a mortgage under the power for sale.

Power of sale includes power to mortgage.

Mortgage but partial execution of power and revocation pro tanto only.

It should also be distinctly remembered, that a power, though exhausted at law, may be but partially executed in equity. Thus where a person having a power of revocation and appointment, mortgages the lands in fee, such mortgage in equity operates only as a partial execution, a mortgage being considered in equity merely as a security for the debt. *Perkins v. Walker*, 1 Vern. 97. *Thorne v. Thorne*, ib. 141. 182. *Lassells v. Lord Cornwallis*, Pre. Ch. 232. A form on this subject will be found in the Third Volume; and whatever may be the form of the instrument, if it be in effect simply a mortgage, it will operate merely as a revocation *pro tanto*. But where there is not only a mortgage, but an ulterior disposition inconsistent with the former, it will operate even in equity as a total appointment or revocation, unless there be a declaration that it shall be an appointment or revocation only *pro tanto*. *Fitzgerald v. Fauconberg*, Fitzg. 207. 6 Bro. P. C. 390. et vide Sug. on Pow. 272, 2d edit. *Thwaytes v. Dye*, 2 Vern. 80. S. C. 3 Ch. Ca. 69. *Keworth v. Bate*, 6 Ves. 797, and ante, vol. i. 115, note (G).

Priority of estates conferred by power to charge.

On the subject of powers, it is further observable, that if by marriage settlement an estate be limited to the husband for life, and then to trustees for 300 years to raise portions for younger children, with a power reserved to the husband to charge the premises with a sum of money subject to his life estate; and he afterwards executes his power in favor of a mortgagee; the claim of the mortgagee will be preferred to that of the younger children, for his estate comes in after the life estate of the settlor, to which only the power is subject. *Mosley v. Mosley*, 5 Ves. 249. But in this case, it seems that if the estate

tail, with remainder over, they, on the marriage of C. K. with B. his first wife, in consideration of the marriage and portion, levied a fine and suffered a recovery to the use of K. the father, remainder to C. K. and the heirs of his body upon B. begotten, the remainder to the heirs of the body of C. K., remainder over, with power for K. by deed in writing to charge all and singular the estates with the payment of 2000*l.* K. and C. K. afterwards, without reciting the power, made a mortgage by lease and release for securing 2000*l.* *with interest.* Then K. died, and B. also died, and C. K. married a second wife, by whom he had issue a son, and then died. And the money not being paid, the mortgagee brought an ejectment in the Court of Exchequer. And two questions were agitated, first, whether the conveyance by lease and release was a good execution of the power? secondly, if not, whether the settlement, as to the issue by the second marriage, was not voluntary and void against the mortgagee? It was agreed on the first question, that the lease and release was a good execution of the power in point of form, notwithstanding it was by two deeds instead of one, and the son joined in the conveyance; but the question was, if this conveyance of a fee, redeemable upon payment not only of the 2000*l.* but also of interest, was good, or if not good for the interest it was good for the principal? And Sir Matthew Hale and the Court held, that it was not a good execution of the power; because by such means, the estate might be charged with a great sum of money, which would defeat the settlement. And the power was entire, and so ought the execution to be, and it could not be made good in part, and void for the residue *at law.* But Hale said, that perhaps there might be ground for equity to aid the execution as to the 2000*l.* And on the second question, Hale inclined that the consideration of marriage, and a portion, might ex-

[1034]

were insufficient to answer both charges, it would give room for a very material question, *ib.* 259. This suggests the propriety of expressing with the greatest nicety, all the charges to which it is intended the power to charge shall be subject.

The discretion of trustees, having a power to change securities with consent, &c. will not be controuled unless mischievously or ruinously exercised. *De Mannville v. Crompton*, 1 Ves. & Bea. 354.

P. 1033
continued.

tend to all the estates in the settlement, and judgment was given for the defendant.

The mortgagee afterwards brought a bill in Chancery, to have the defect in the execution of the power supplied there, but could gain no relief (t); it being held there by Bridgman, Chancellor, that the marriage and portion of the first wife extended to the issue of the second, and that the father and son joining in the conveyance, and the power not being recited therein, it could not be intended to be done in execution of the power, but as owners.

Voluntary mortgage void against purchaser, but good if assigned for value (H).

A voluntary mortgage will be void as fraudulent against a purchaser for valuable consideration, but such mortgage may become a good one, by being assigned for a valuable consideration.

[1035]

Thus, in *Andrew Newport's* case (u), which was upon an assignment of a mortgage made by K. in 1659, and after by divers mesne assignments vested in N. as executor of C.; it was objected, first, that it did not appear, that any money was paid upon the original mortgage, and that therefore it was fraudulent, and that it being fraudulent in the creation, though C. paid a valuable consideration, yet this would not purge the fraud, and make it good against the defendant, who was a purchaser *bona fide*, and for a valuable consideration: *sed non allocatur*: for Holt, Chief Justice, said, that the first mort-

(t) 1 Lev. 151, 2. 1 Ch. Rep. 103.

(u) *Andrew Newport's* case, Skin. 423. S. C. by the name of *Smartle v. Williams*, 1 Salk. 245. 3 Lev. 387. Holt, 478. Comb. 247, [ante, 660,

in the text,] et vide *Prodger v. Langham*, 1 Keb. 486. Sid. 133, pl. 7, [and *Hannam v. Woodford*, Holt, 263. S. C. Skin. 300.—Ed.]

Voluntary mortgage.

(H) As to what shall be a voluntary mortgage, it has been held, that where a father at the request of his son, executed a mortgage to secure a debt due from the son to the mortgagee, the mortgage was not a voluntary conveyance without consideration; for that the consideration was in law equal, whether a man pledged his estate for his own debt, or for the debt of another. *Hearne, Ex parte*, 1 Buck. B. L. 165. 170. S. C. ante, vol. i. 212, *in notis*, et vide for another case on the subject of a voluntary conveyance connected with a mortgage, *Wrixon v. Cotter*, 1 Ridgw. P. C. 295.

gage was good between the parties, and being so, where the first mortgagee assigned for a valuable consideration, this was all one, as if the first mortgage had been upon a valuable consideration, for now the second mortgagee stood in his place, and therefore was within the *proviso* of the stat. 27 Eliz. c. 4. "*that no mortgagee, bonâ fide, and upon good consideration, shall be impeached by force of this act; but it shall stand in such force as before the act made.*" And he said, if this *proviso* did not extend to this case, to what case would it extend?

In the last-mentioned case, a second objection was also taken to the assignment, upon the ground, that it was not made upon the land, which, as the mortgagor was not a party, and the mortgagee was never in possession, it ought to have been; for though it was admitted, that the first assignment was good, upon the presumption that the mortgagor was in the nature of tenant at will to the mortgagee, and so is possession the possession of the mortgagee, yet, by the assignment, the will was determined, and the mortgagor was not tenant at will to the second assignee. But the objection was held, by Holt and the Court, to be bad; for though the mortgagor was not tenant at will to the second assignee, yet he was not a disseisor, but a tenant at sufferance, and if no disseisin was

Mortgages may assign notwithstanding he has not entered on land (1).

[1036]

(1) This subject, which occupies the eleven succeeding pages, has been amply discussed in a previous note, ante, vol. i. page 155, et. seq. where the respective estates of the mortgagor and mortgagee are incidentally considered, but it is there submitted, that their rights are of too complex a nature to admit, without circumlocution, of a specific definition. They partake partly of legal and partly of equitable rights,—partly of one species of tenancy and partly of another. At one time, the mortgagor is a tenant at will, at another a tenant by sufferance; and the mortgagee when in possession is at the same instant both bailiff to the mortgagor in equity, and absolute owner of the estate at law; *quo teneum vultus mutantem protea nodo?* Hor. Ep. 1. 1. 90. For all useful purposes it seems more correct, as well as more comprehensive, to adopt the suggestion of Mr. J. Buller, and to say, that between the parties there subsists the relation of mortgagor and mortgagee, rather than to designate them by names which are partially descriptive of their powers and situation, and which serve in the end merely to confuse and mislead*.

Reference to compound nature of estates of mortgagor and mortgagee.

* The residue of this note is inserted in the First Volume, page 157.

made, then no right was divested; and no disseisin could be made without a tortious entry, and here there was no new entry; and therefore, though he was tenant at sufferance, yet the mortgagee (his estate not being divested and turned to a right) might assign. And G. Eyre, Justice, said, that when a mortgagee for himself, his executors, administrators, and assigns, covenanted with the mortgagor, that he should enjoy and take the profits till default of payment, the covenant being for his assigns, this would rule the whole case, and he should be presumed tenant at will to all the assigns, as well as to the first mortgagee.

Effect of covenant that mortgagor shall enjoy till default (K).

Under this covenant mortgagor may disseise mortgagee by feoffment, and bar him by fine.

But, if any act were done by a mortgagor in possession, under the clause that he shall enjoy until default of payment, which amounted to a disseisin, or divested the estate of the mortgagee, and turned it to a right, the assignee of a mortgage so circumstanced, would gain no estate by his assignment, and would be defeated in any attempt to gain the possession, until such tortious act was done away, and in cases which might be put, absolutely barred. As if a mortgagor in possession under such clause, were to make a disseisin by feoffment, and then levy a fine, followed by five years non-claim; this, I should presume, would be a complete bar to the mortgagee, and all claiming under him (L).

(K) See the six learned and ingenious distinctions of Messrs. Morley and Coote on the effect of this covenant, ante, vol. I. 157 b; et vide 2 Jac. & Walk. 49. Butl. Arg.

Effect of fine.

(L) Provided no interest were paid on the mortgage during the five years, and even then it would be questionable, as the feoffment would be founded in fraud, and no clear disseisin would be created; see 2 Pres. Conv. intro. xxxii. et vide *Doe v. Heller*, 3 T. R. 173, where it was said by Buller, J., that "a mortgagor levying a fine and continuing in possession, cannot bar the mortgagee; which may be supported under the doctrine of remitter, for supposing the feoffment to create a disseisin, the mortgagor would be in of his old estate, which was a tenancy at will, or some such tenancy to the mortgagee. This is sanctioned by the case next cited, and that of *Holland v. Hutton*, Carth. 415,—the doctrine that a mortgagor could by fine bar the mortgagee, being there considered intolerable.

Where a mortgagee entailed the lands mortgaged by fine, &c. and the mortgagor afterwards sued for redemption, which was decreed him, and he paid the money, but no mention was made of the entail in all the proceedings, and

But, as great mischief would ensue, if the motion of disseisins against the intent of parties, by the accidental acts of tenants at will, were encouraged, the courts have set their faces against obstacles of this kind wherever they have occurred.

Thus, in the case of *Powseley v. Blackman* (x), mentioned before in this treatise, and which arose on a special verdict in ejectment, it was stated, that the mortgagee did not enter into the land mortgaged, and that the mortgagor, before any of the days of payment, let it for several years, rendering rent to himself, and died, and the lessee entered by virtue of the said demise, and took the profits, claiming nothing but the term, and at the end of the term surrendered up the lands to the lessor, and that the mortgagee afterwards made his will, and devised the estates in question; and, it being admitted, that the mortgagor was only tenant at will or tenant at sufferance to the mortgagee, it became a question, whether his making a lease for years, and the lessee entering and paying the rent, and claiming nothing but the term, and after, in the end of the term, yielding up the possession to the bargainor, should be a disseisin; and if it were a disseisin, whether it was not purged by the re-entry of the mortgagor, and his occupying it *in statu quo prius*, and reducing the inheritance to the mortgagee, so as he was not out of possession, and so his will good; *for on that fact the validity of it depended*. And as to this point all the justices resolved, that when the mortgagor entered (as it should be conceived, upon the verdict, he did) if he were a disseisor before (as they did not agree that he was, because neither the lessor nor lessee intended to make any disseisin, the lessee claiming but his term) it was only a disseisin in the *lessee for years*; and when,

Re-entry of mortgagor after disseisin by stranger, re-mits him to his ancient character.

(x) *Powseley v. Blackman*, Cro. Jac. 158; et vide *infra*, 1039, in the text. 639. [S. C. ante, vol. i. pages 135. —Ed.]

within time the issue of the mortgagee brought ejectment and recovered possession of the premises, yet his mortgagor was relieved, for he paid his money pursuant to the decree, and was in no fault; the Lords Commissioners therefore decreed the issue to convey, and granted a perpetual injunction against the judgment. *Chapman v. Duncumb*, 2 Vern. 142.

the term being expired, the bargainor re-entered,—that purged the disseisin, and the mortgagor was in, as he was before, and the inheritance was re-vested in the mortgagee, and his will should be good. And therefore they held, that if tenant at will were ousted by a stranger, and he re-entered, he was tenant at will again to his lessor: for otherwise, it would be a mischievous case in many assurances, where the mortgagor being in, upon condition to pay at the end of the year, and in the interim, that the mortgagee should not meddle, and the mortgagor made a lease for half a-year, and after re-entered before the day of payment, that the mortgagor should be a disseisor against his own intent, and the intent of the mortgagee, and that the mortgagee should be said to be out of possession, so as he could not make a bargain and sale at his will. By this means many assurances would be destroyed, which law would not suffer. Wherefore the law accounted, that the mortgagor by his entry was in of his former estate, and that the will of the mortgagor was good.

*Tenant at will
leasing for
years, disseisor
at election.*

And in the case of *Blunden v. Baugh* (y), which arose afterwards, it was held, such underlease by lessee at will, would not make a disseisin against the lessor *volens volens*.

There H. being seised of land in tail, by indenture covenanted, in consideration of marriage between W. his eldest son and heir, and E., to suffer a recovery of certain lands to the use of the said W. and E., and the heirs male of the body of W., with divers remainders over. The marriage took effect, and W. entered by the assent of his father and occupied at will; and afterwards by indenture demised the land to A. and B. for twenty-one years rendering out. The lessees entered, and were possessed, and they being so possessed, the father and son by indenture covenanted with D. and others (for that the said settlement was not executed, for the performance of the assurances and uses comprised therein) to levy a fine of those lands, amongst other uses, to secure a jointure to E., which fine was levied accordingly. Then W. (the son) died without issue male of his body; afterwards A. (one of the

lessees) died; and then B., the other lessee, by indenture inrolled within six months, in consideration of a competent sum of money, bargained and sold the lands to C., then son and heir apparent of H., and to his heirs. Afterwards H. (the father) died, and C. (the son) entered, upon which the jointress entered; and on an ejectment brought by C. to recover the possession, judgment was given in the Common Pleas by three judges against one, for the plaintiff the son; but on writ of error in the King's Bench, it was held by three judges against one, that the judgment was erroneous. The main question was, whether by any of these acts there was a disseisin committed to H. *volens volens*? and if there were a disseisin, who should be the disseisor and tenant to the freehold? And as to the first point, Jones, Berkeley, and Croke, held, that the law would not impute nor construe it to be a disseisin, unless at the election of H. when none of the parties intended it to be a disseisin, nor to oust him of the possession; for as Coke, Littleton (158), defined it, *a disseisin was where one entered intending to usurp the possession, and to oust another of his freehold*; therefore the court were to inquire, *quo animo hoc fecerit*, why he entered and intruded? and it was at the election of him to whom the wrong was done, if he would allow the wrong-doer to be a disseisor, or himself out of possession. *Tenant at will*, they said, was at the will of both parties, and the will should not be determined by every act. And they cited and approved the case of *Powseley v. Blackman* (a); and they said, that it should not be intended, that the son intended to disseise his father, but that the lease was made by the assent of the father; also the party to whom the lease was made, did not claim any freehold, but to have the lease only, and to pay his rent, and paid the rent accordingly; so there was no intent in any of the parties to make a disseisin; then the law should not construe it to be a disseisin *partibus inuitis*. And that hereby it followed, that the freehold remained in H., until the fine levied by him and his son W., and so the uses thereof were well raised, and the jointure well assured. But they held farther, that if there were a disseisin committed by these acts, W., who made the lease, was

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(z) Ante, 1037, note (x).

But his lessee
entering, creates
immutable
disseisin.

the disseisor and tenant, *quo ad* all persons, but the first lessor, but *quo ad* the first lessor, they both were disseisors; for when tenant at will took upon him to make a lease, which was a greater estate than he might make, that act was a *disseisin*, and by this lease for years made, and the lessee's entering and paying the rent unto him, and he accepting thereof, he was in as lessee, and the lessor was the disseisor, and had the reversion expectant upon this lease; and this lease betwixt them, was an interest derived out of the inheritance, gained by this *disseisin*; for if a lessee for years made a feoffment, although it were a *disseisin* to the lessor, yet it was a good feoffment betwixt them *de facto*, though not *de jure*, and the feoffee was in the *per*, and warranty might be annexed to such an estate upon which he might vouch. And if such lessee for years or at will, made a gift in tail, or a lease for life, that created a good lease, or a good gift in tail amongst themselves, and all others besides the first lessor, and as to him they were both disseisors. Then when lessee for years entered according to the lease, and paid his rent, the freehold betwixt them should be in W., who made the lease, and not in the lessee; and then the fine levied by H., and W. his son, conveyed well the freehold, and the uses were well raised upon this fine, and the jointure well settled. And on these grounds they held, that the judgment ought to be reversed, and the majority of the judges agreeing with them, it was reversed accordingly.

[1040]

Ejectment
(though it com-
plain of ouster)
no evidence of
mortgagor's
election to be
out of posses-
sion.

In *Andrew Newport's case*, before mentioned (a), it was contended, that though the mortgagee was not out of possession by the assignment, yet he might be out of possession in that case at his election, and that he had made his election there to be out of possession, for he had brought an *ejectione firmæ*, and by it admitted himself to be out of possession, for the ejectment complained of a tortious *entry*, and an *ouster*, and this being a matter of law, he was estopped to allege the contrary, *sed non allocatur*; for *per curiam*, an ejectment, as it was in common practice, was but a feigned action, to which

(a) Ante, 1034. Skin. 423. 1 Salk. 245. 3 Lev. 387. Holt, 478. Comb. 245.

the lessor of the plaintiff, who was the principal person, was not a party; and not being a party, this could not be given in evidence as an estoppel against him; and therefore he could not maintain an action for the mean profits, without an actual entry, but the lessee might; and it had been ruled, that the bringing of an ejectment, was not such an entry or claim, which should avoid a fine and non-claim for five years.

But, if the mortgagee enter upon the mortgagor, and he re-enter, this will be a determination of the will (*b*), and the re-entry of the mortgagor a merely tortious entry, in which case an assignment by the mortgagee without a re-entry would not be valid. So, if the mortgagee or his assignee, by his manner of pleading, were to admit a disseisin, the assignment must be made on the land, or it would be bad.

Assignment of, mortgage must be made on land when.

A question arose in the case of a bankruptcy (*c*), between the assignees of a bankrupt and a mortgagee of the brew-house, whether the fixtures passed by the mortgage on the following facts: In 1745, R. sold the utensils of a brew-house, and let a lease of the brew-house to B.; and in 1746, mortgaged his brew-house, with the appurtenances, &c. to I. S. B., after this, sold his lease and utensils to W., who, for a sum of money in 1748, mortgaged the whole to R.; afterwards R. became a bankrupt, and his effects were vested in Q., as assignee under the commission, who, as standing in the place of the bankrupt, was entitled to the mortgage from W., and by virtue thereof claimed the utensils.

Mortgage of brewhouse, with appurtenances will not carry utensils.

[1041]

I. S., the mortgagee of the brew-house, in 1749, insisted, that the fixtures passed by his mortgage (*d*); a petition was therefore preferred to the Chancellor for a delivery of all the utensils.

(*b*) Per Holt, in *Smartle v. Williams*, as reported, Ca. temp. Holt, 478. [*S. C.* ante, vol. i. 163, text.—*Ed.*]

vol. i. 39, and some of the late determinations subjoined in the notes (*Z*) and (*D*), ante, vol. i. p. 40, *ib. et vide Dale, Ex parte*, 1 Buck. B. C.

(*c*) *Quincy, Ex parte*, 1 Atk. 477. 365.—*Ed.*

[This case has been mentioned ante, (*d*) *Quincy, Ex parte*, 1 Atk. 477.]

Et per curiam, this is a case for a mere action at law (e), and might be determined by action of *trover* or *detinue*. I am inclined to think, it was not the intent of R. to mortgage the utensils; for there is some description generally of things in a brew-house. The manner of describing the parcels, shews, that he did not at all mean to mortgage the utensils, for the word *appurtenances* seems to intend only things belonging to out-houses.

Rule as to fixtures between heir and executor, landlord, and tenant (M).

The rule as to fixtures, as between an heir and executor, is another thing (f). The freehold descending on the heir, the executor cannot enter to take away fixtures, without being a trespasser. But there is another rule between landlord and tenant; during the term a tenant may take away chimney-pieces and even wainscot, which is a very strong case, but not after the term; if he did, he would be a trespasser. A mortgage, it is said, is a purchase, but then it is a redeemable one. How does it stand between a purchaser and a vendor? If a man sells a house, where there is a copper, or a brew-house, where there are utensils, unless there was some consideration given for them, and a valuation set upon them, they would not pass. But then another question will arise; what action can you bring? For where things are fixed to the freehold, an action of *trover* will not lie for them. Several sort of things are fixed to the freehold, and yet may be taken away, as beds fastened to the ceiling with ropes, nay, frequently nailed, and yet no doubt, but they may be removed. The difficulty with me is, the possession of the mortgagor; but that is cleared up, because it was the express agreement between the parties, that the mortgagor should not be prevented from coming on the brew-house. I apprehend the sale of the utensils was a de-

(e) Quincy, *Ex parte*, 1 Atk. 477.

(f) Ibid.

(M) As to what shall be fixtures, see *Davis v. Jones*, 2 Barn. & Ald. 165. *Elwes v. Mawe*, 3 East, 38; a *Lime-kiln*, *Thresher v. East London Water Works Company*, 2 Barn. & Cres. 608. *Colegrave v. D. Santos*, ib. 76; a *Conservatory*, *Buckland v. Butterfield*, 2 Brod. & Bing. 54; a *Veranda*, fixed with posts to the ground, *Penry v. Brown*, 2 Stark. 403; a *Windmill*, *Steward v. Lamb*, ante, vol. i. 37. 40, n.

feasible sale, to revert to the *mortgagor*, the bankrupt, at the end of the term; and if so, there is an equity in the grantor, and therefore, as to the mortgagee, a possession in the bankrupt. Let it stand over to the next day of petitions, and let the mortgagee produce all deeds and writings, and the assignee at his expence to take copies, if he pleases.

Upon a bill in equity the case was, that the defendant W. had mortgaged lands to the other defendant, and then articulated with the plaintiff H. to sell him the said land free from all incumbrances for 250*l.*, of which 50*l.* were actually paid to the defendant W. (*g*). Afterwards W. released to R. the condition and power of redemption, and pending the same bill, released to the said R., the mortgagee, all his right in and to the lands; but no money or other valuable consideration appeared to have been paid or given for either of these releases; and the court held, that neither of them ought to obstruct the conveyance to H. by W.; because they were given without any valuable consideration, and one of them pending this suit; and that both these releases ought to be set aside, as to the plaintiff.

Release of equity of redemption, without consideration pending suit, set aside.

But in the last case the court doubted (*h*), whether, upon the bill as framed, the defendant R. could be compelled to convey his estate to the plaintiff, upon the payment of what was due upon the mortgage and interest; because the bill prayed only a discovery against R., and that W. should make the assurance and to be relieved in the premises, and no conveyance from R. was required.

Whether on bill of discovery defendant can be decreed to convey.

Where an equity of redemption is purchased in by several persons interested in a mortgage, it shall enure to the mortgagees in the same manner as they hold the mortgage.

Joint mortgagees purchasing equity of redemption generally, hold it as they did mortgage (N).

(*g*) *Hill v. Worsley*, Hard. 320.

(*h*) *Ibid.* sed vide *Brent v. Best*, 1 Vern. 69. S. C. infra, 1043 a.

(N) That is, as they hold the land, and not as they are entitled to the money, for supposing them to be tenants in common of the land, and joint tenants of the money, the equity of redemption would enure to them as tenants

[1043]

And, therefore, where a man having a mortgage for years, by his will (i), devised all his personal estate, of what nature soever, to his executors, in trust for the payment of his debts, and afterwards devised the residue and overplus of his said personal estate to his two daughters, *equally to be divided between them*, and died; and, the debts being satisfied, the daughters contracted with the mortgagor for the purchase of the equity of redemption, and inheritance of the mortgaged estates to them and their heirs, and articles were executed on both sides accordingly; and a decree obtained for a specific execution. One of the daughters, after the death of the other, claimed the whole inheritance by survivorship, as a joint-tenancy; and the question on a bill filed by the devisee of the deceased daughter was, whether this purchase of the inheritance were a joint-tenancy, or a tenancy in common? And it was decreed to be a tenancy in common; for so was the mortgage devised to the two daughters, whereon this purchase of the equity of redemption and inheritance was founded; and therefore they, having several and distinct interests, as tenants in common of the mortgage, and paying an equal proportion for the purchase of the equity of redemption and inheritance, should have that in the same manner.

Equity of redemption purchased by mortgagee's executor, assets.

Where an executor bought an equity of redemption of an estate, on which a testator had a mortgage, it was considered as assets, and liable to legacies (j).

Mortgage money paid in, tenant for life entitled to one-third, and remainder-man to residue (o).

Where one devises lands mortgaged to one for life, remainder over, the money, if the lands are redeemed, shall be apportioned,

(i) *Edwards v. Fashion*, Pre. Ch. 352.

(j) *Ryall v. Ryall*, 1 Atk. 59.

in common, and so *vice versa*, and therefore it is perhaps too generally laid down, ante, p. 672, n. (N), that if two mortgagees purchase the equity of redemption, they will in every instance hold the land as tenants in common.

Tenant for life now entitled to interest only,

(O) This rule was propounded when a similar one prevailed with respect to contribution. See ante, vol. i. 312, in the text. But the latter doctrine having been exploded, see note (M), *ib.*, it is fair to presume that the rule in

And, if the claims of the parties are before the court, it will adjust them, without a specific bill for that purpose.

Thus (*l*), where one having mortgaged unto B., part of his copyhold lands in fee, being customary lands of inheritance, B. surrendered them to the use of his will, and devised them to his wife for life, remainder to C. in fee, and made his wife executrix, a bill being pending to redeem, to which tenant for life and the remainder-man were defendants; it was prayed on behalf of C. that if the mortgagor redeemed, C. might have a proportionable share of the redemption money, according to the value of the estate he had in the land. And the matter, in fact, appearing to be so upon the pleadings, although C. had no cross bill for the purpose, nor had so much as insisted upon it in his answer, it was ordered by the Lord Chancellor, [1044] that C. should have his proportionable share of the redemption-money. And the ordinary rule of the court, in such case, was said to be, that one-third of the money should be paid to the tenant for life, and the two-thirds residue to the remainder-man.

Where one mortgaged his estate to F. (*m*), who paid no money in consideration of the mortgage, but gave the mortgagor a bond for 130*l.*, the mortgagor afterwards made the mortgagee his executor and died. Then the heir of the mortgagor brought his bill to have the real estate exonerated, considering this bond as assets in the hands of the defendant. And so it was held to be; for notwithstanding, at common law, the making an obligor executor, extinguishes his debt, yet, in this case, the bond shall be considered as assets in the

Mortgagor appoints mortgagee his executor; land exonerated under circumstances.

(*l*) *Brent v. Best*, 1 Vern. 70.

(*m*) *Fox v. Fox*, 1 Atk. 463.

the text, which is in truth the same rule, but conversely applied, would follow the like fate; consequently it is probable that where there is a tenant for life with remainders over, of money due on mortgage, and the debt is discharged, the court would decree the particular tenant to be entitled to the interest for his life, and at his death, that the principal should devolve on the remainder-man; to effect which the money may be laid out in land, or invested in the funds in trust for the particular tenant, for life, and after his death to such other uses as the case may require.

and money would probably be invested to give him interest for life.

hands of the defendant the executor, and applied, for the payment of funeral expences and legacies, to the exoneration of the real estate in favor of the heir.

*Covenant to
levy fine next
Easter Term,
to certain uses.
Fine levied
three years
after may be
to other uses.*

Where a mortgage is made by baron and feme, and there is a covenant to levy a fine, and the fine is covenanted to be levied of a certain term, if the fine be not levied by the time in which it is covenanted to be levied, it seems that it will not strengthen the deed of mortgage, if any other uses be declared by a subsequent deed.

This question occurred in the case of *Fleetwood v. Templeman* (n). There, a man and his wife, in the year 1692, made a mortgage of the wife's estate of 40*l. per annum*, for the sum of 789*l.*, and covenanted in the mortgage deed to levy a fine of the estate in the *Easter Term* following. The fine was not levied till *Trinity Term*, in the year 1695; then, in consideration of 10*l.* more, they joined in a conveyance of the equity of redemption to an assignee of the mortgagee, and covenanted, that the fine theretofore levied, should be to the uses of this deed; afterwards the husband being dead, the wife, the estate being increased in value, filed her bill to redeem; and one ground, on which she founded her claim, being the invalidity of the latter deed to declare the uses of the fine, Lord Hardwicke said, that he was inclined to think, as the covenant to levy the fine was confined to *one* particular term, and was not levied till the next term after, that the husband and wife might, by the deed in 1695, covenant that the fine theretofore levied should be to the use of the latter deed, and the former deed in 1692, might be laid out of the case, as the covenant under it, for levying the fine in *Easter Term*, was not strictly pursued. But it is said in Barnardiston's Reports, that his Lordship said, he would not determine the case upon this point only, but upon the whole circumstances, which he did accordingly against the mortgagor.

[1045]

*Cestui que trust
answerable for
pledge, if his*

The *cestui que trust* of things mortgaged, is answerable, if his trustee produce them not on application to redeem; and

(n) 2 Atk. 80. S. C. Barn. Ch. Rep. 187, [et ante, 706, n. (D).—Ed.]

that as well where he is constituted trustee by inference of law, as where he is appointed by the positive act of the party.

trustee produce it not, on application to redeem (o 2).

Thus, where P. (o), whose executor the plaintiff was, being possessed of certain pieces of hangings, put them into the hands of A., an upholsterer, to sell for him; but having occasion for money, desired B., who was a scrivener, to lend him 500*l.* on the hangings, which he did, having previously inquired of A. as to their value. And afterwards P. borrowed on the hangings 100*l.* more, and gave a judgment also for the debt, with interest, the hangings being still in A.'s hands. The money lent belonged to C., for whom B. dealt as a scrivener, but neither P. nor his executor knew that, nor did C. appear therein, though the securities were in his name. A. sold the hangings privately at an under value. B. and C. pretending ignorance of the sale; but A. after the sale, desired the plaintiff, the executor of P., to sell them, who refused so to do, unless he might first see them. The plaintiff paid the money borrowed and interest, and the securities were thereupon delivered up to him by B., in whose hands they had always been, but the hangings being sold, could not be had; and B. said, he had nothing to do with A. Hereupon the plaintiff, the executor of the mortgagor, exhibited his bill in Chancery against A., B., and C., to have the hangings or the value in money. And it was decreed, that the defendants should pay the money. Then B. and C. petitioned for a rehearing, and that the decree might be explained as to them only; for that there was no reason to charge them, as they did not put the hangings into A.'s hands, but they were placed in A.'s hands by P., with power to sell them, and therefore they (B. and C.) ought not to be charged by A.'s default. But the Lord Chancellor, on long debate, affirmed his former decree; for by the sale and mortgage, P. divested his property, and the

(o) *Perkins v. Avery*, 2 Ch. Ca. 226, [et vide infra, Chap. XXIII. sec. I. final paragraph.—Ed.]

(O 2) But in a late case it has been held, that if A. lends money to B. and receives a gun as a security for the re-payment, A. may recover the amount without first returning the gun. *Lawton v. Newland*, 2 Stark. 72.

goods became B.'s, and A. became trustee for B., and B. must answer for his trustee A., who sold them after the mortgage. And though B. pretended to act as a scrivener only, and as an agent to lend B. money, they were to be looked on as one person as to the plaintiff, for the scrivener keeping the securities for B., B. trusted him thereby with all, and he had power to dispose of the monies, and he undertook the same by keeping the securities, and should be answerable as B.

Of pleading a mortgage (P).

Where a defendant pleads a mortgage (r), he ought to shew that the mortgagor being, or pretending to be, seised in fee of the premises, did make such mortgage, &c. otherwise the person undertaking to mortgage, may be a mere stranger, and have no interest in the premises, though he takes upon him to mortgage them.

Counterpart evidence.

Where the original deed of mortgage was lost, it was decreed, that the counterpart should be allowed as an *original*, and admitted as such at any trial, &c. (s).

Costs due to baron and feme on mortgagee's plea being over-

The plaintiff and his wife brought their bill to redeem a mortgage of the wife's estate (t); the defendant put in a plea to the bill, which was over-ruled, for which 5*l.* costs was of

(r) 3 P. Wms. 281.

(t) *Coppin v. ———*, 2 P. Wms.

(s) *Briscoe v. Denbigh*, Finch, 237. 497.

Pleading.

(P) Possession under a decree of foreclosure inrolled is a good plea, MS. 15 Vin. Abr. 478. (C. a.) So it is sufficient to say "*obl' præd' pignorum fuit præd' A. B. &c.*" without saying how it was mortgaged, ib. In *Baily v. Taylor*, the defendant pleaded in bar, that the close mentioned in the condition of the bond was not mortgaged; the plaintiff replied, that it was, and thereupon issue was joined, and found for the plaintiff. The defendant then moved in arrest of judgment, that the replication was not good, for that it should have alleged that the mortgage was not redeemed, as well as that the close was mortgaged. But three of the Judges against one, held, that the replication was in direct answer to the plea, and therefore, that it was good, upon which judgment was given for the plaintiff, Yelv. 25. In debt, the plaintiff declared that the defendant bound himself, his *heirs*, executors, and administrators, to pay the mortgage money; upon *non est factum* pleaded, it appeared that the defendant bound only himself, his executors and administrators; this variance was held immaterial, for, per Bayley, J. the judgment would bind his heirs, whether he bound them by deed or not. *Hamborough v. Wilkie*, 4 Mau. & Selw. 474, n.

course given to the plaintiffs; the defendant brought a cross bill to foreclose the wife, who being the surviving plaintiff in the original cause, moved the court, that proceedings should stay in the cross cause, until the plaintiff, who was defendant in the original cause, had paid the 5*l.* costs due upon overruling the plea. It was objected on one side, that these costs must be intended to have been laid out by the husband in the original cause, and that, consequently, upon his death the same were lost. On the other side, it was insisted, that this original suit was in right of the wife, who being entitled to the equity of redemption, the husband joined therein only for conformity; and that the suit was not abated by the death of the husband, the order for costs being in nature of a joint judgment, which must survive to the wife; and that the sum for costs was certain by the course of the court, though not expressed in the order. The Lord Chancellor for some time doubted, but afterwards taking it to be as a joint judgment for a sum certain, determined that it did survive to the wife; whereupon it was ordered, that proceedings should stay in the cross cause, until the defendant in the original cause should pay the 5*l.* costs for over-ruling his plea (R).

ruled, survive to wife (Q).

[1047]

(Q) The general rule is, that costs decreed to a plaintiff or defendant fall to the ground by the death of the party before they are taxed, but when taxed, they become a judgment debt, and if the party to whom they are given, dies, they go to his representative, who may revive for costs only. Sel. Ca. Ch. 21. *Hall v. Smith*, 1 Bro. C. C. 438. S. C. 2 Dick. 649. *Edgill v. Brown*, 1 Dick. 62. *Lowton v. Mayor of Colchester*, 2 Meriv. 116, and *White v. Hayward*, 2 Ves. 462. S. C. 3 Ves. 197, cited; where it was held, that if a defendant be in execution for costs, and the plaintiff die, an order may be obtained, that his representative shall revive within a certain time, and if he does not, that the defendant be discharged. To these rules the case in the text may be considered an exception.

Right to costs dies with person.

(R) The following miscellaneous observations may be referred to this chapter :—

Where by deed dated 26th of August, 1795, C. covenanted to pay J. 120*l.* on the death of one B. (who was dead), and J. assigned the sum of 120*l.* due on the covenant to N., by way of mortgage to secure the payment of 60*l.* and interest, with a common proviso; it was contended that by this assignment the whole right and interest in the 120*l.* became vested in N., the condition being broken, and therefore that an assignment of this sum to Lane, the plaintiff, under the 41 Geo. 3. c. 70. (the then Insolvent Act) was inoperative. It was held that the plaintiff might recover the surplus of the money due beyond the mortgage. *Lane v. Chandler*, 3 Smith, 77.

Mortgage of money due on covenant.

Instalments.

An agreement that the mortgagor shall be at liberty to pay off the money advanced by instalments, in which case a proportion of the land to be discharged, has been held to be a good agreement. *Vaughan v. Morgan*, Finch, 138.

Collateral security.

Where A. gave a cash note to C. for 500*l.* and mortgaged his estate to B. as a collateral security for the money, and C. kept the note by him, and B. became bankrupt, on a bill brought by A. for relief against the mortgage, because C. neglected to turn the note into money: it was held that A.'s estate was liable to pay the principal and interest due on the mortgage. *Lake v. Mason*, 4 Bro. P. C. 553.

Insurance.

If a mortgagee of goods, after the mortgage has become absolute, receive instructions from the mortgagor to insure them, he must, if he intends to refuse, give notice to the mortgagor, that he may apply elsewhere, otherwise he will be taken to have assented. *Smith v. Lascellas*, 2 T. R. 187.

Writ of error.

A covenant in a mortgage deed for re-payment of the money, is a contract within the 3 Jac. 1. c. 8, so that a mortgagor cannot take out a writ of error on a judgment had thereon, without first perfecting bail, according to that statute. *Buckney v. Meikham*, 3 Taunt. 583.

Plaintiff required to elect.

The court will require a plaintiff (proceeding against a defendant for specific performance of an alleged agreement for a mortgage entered into by the defendant's testator, for securing money advanced to him on such agreement and other debts; and also for an assignment of a bond alleged to have been satisfied by the plaintiff's testator, and constituting part of the plaintiff's demand), to elect one of such objects of the prayer of his bill, on the ground of inconsistency in the application for both at one and the same time. The plaintiffs having elected to pray an assignment of the bond, a reference to the deputy remembrancer was ordered, to ascertain the fact of payment of the debt, and if paid, the nature of it. *Jackson v. Radford*, 4 Price, 274.

[1018]

Mortgage of Chelsea pension, void.

By the 28 Geo. 2. c. 1, it is enacted, that all contracts whereby a pension of the Chelsea hospital shall be mortgaged, shall be void. This humane regulation was introduced by Lord Chatham, while paymaster-general of the forces, and will ever remain a standing monument of his humanity. "Prior to this regulation," says Dr. Smollett, "the poor disabled veterans who enjoyed a pension of the Chelsea hospital, were so iniquitously oppressed by a set of miscreants, who supplied them with money per advance at the most exorbitant rates of usury, that many of them, with their families, were in danger of starving; and the intention of government in granting such a comfortable subsistence was, in a great measure, defeated." Smoll. Con. of Hume, c. ix. vol. xiv. Ster. edit. 178.

Power of attorney.

If, on a mortgage transaction, the mortgagor gives a power of attorney to effectuate any part of the security, such power, contrary to powers of attorney in general, is irrevocable by the act of the party. *Walsh v. Whitcomb*, 2 Esp. 565. But by the act of God it may be revoked, as in the instance of the mortgagor's death or insanity. 2 Meriv. 514.

Mortgagor pays money, but receives it again, mortgage discharged.

As to what shall be a good payment and discharge of mortgage-money, it is observable that where A. indebted by mortgage to B. in 100*l.* paid the money, and B. ordered his servant to put it into his closet, who did so, and then A. demanded his writings, which B. not delivering, A. required his 100*l.* again, which the servant, by B.'s order, re-delivered to A., and A. took and carried it away; it was resolved, that this was a good payment and discharge of the

mortgage, and though A. demanded it again as his own money, yet it should not avoid that which was absolutely paid, but the mortgage remained absolutely discharged, and the money was the plaintiff's; but inasmuch as it was not delivered to A. on any good consideration: he received it as B.'s money, and was accountable to B. for it. *Hewer v. Bartholemew*, Cro. Eliz. 3. 614.

One who has been mortgagee of certain premises, afterwards takes a conveyance in fee-simple, in which the same premises are described as unincumbered, from a vendee of the mortgagor; this, in the absence of fraud, is conclusive evidence to shew that the amount of the first mortgage was paid. *Jones v. Pritchard*, 2 Stark. 52. Evidence.

It is contrary to the duty of an overseer, to borrow money for parochial purposes. In a late case an action was brought against all the overseers of a parish, to recover sums of money lent by the plaintiff to one of them. Mr. Justice Bayley held, that the overseers who had not borrowed the money, in the absence of any express promise, were not liable. *Massey v. Knowles*, 3 Stark. 66. The proper mode of raising money for parochial purposes is by an equal pound-rate on the land-owners of the parish; but in some parishes the overseers are empowered, by a local act of parliament, to raise sums of money by mortgage for the relief and support of the poor. In a recent case, a question arose on the 51 Geo. 3. c. 134, intituled, "An Act for erecting a chapel of ease at Islington." By this act the trustees therein mentioned were authorized to appoint a treasurer, clerk, and other officers, and out of the monies to be received by virtue of the act, to pay such salaries to them as they (the trustees) should think reasonable, and out of the same fund they were to pay to the curate a yearly salary of not less than 150*l*. They were authorized to borrow any sum at interest, not exceeding 30,000*l*., which monies so borrowed, and the interest thereof were to be made payable out of the burial fees, and out of the rates and assessments to be made in pursuance of the act. They were also authorized to grant annuities, provided the money so raised by annuities did not exceed the whole sum intended to be raised for the purposes of the act. They were also authorized to make an assessment on the occupiers of houses, lands, &c. within the parish, not exceeding 2*s*. 6*d*. in the pound on the yearly value, and the rates were to be applied by them to the purposes of that act, during such time as any of the monies to be borrowed upon the credit of the act should remain unpaid, or the annuities granted should have continuance; and by another clause, the trustees were empowered to levy a distress for non-payment of the rates. The trustees appointed under this act raised a sum of 32,636*l*., partly by annuity and partly by borrowing upon common interest; and made a rate to pay the annuities and the interest upon the whole money borrowed. The plaintiff, an inhabitant of the district, objected to this assessment, and permitted himself to be distrained upon for the rate, after which he replevied, and the collector of the rates, who was the defendant, avowed. The plaintiff, after setting out several clauses in the act of parliament, pleaded, that before the making of the assessment, the trustees had wrongfully borrowed more than the sum of 30,000*l*., which by the act they were authorized to do, viz. 136*l*. by annuities, and 2500*l*. by borrowing, and that the rates were made, amongst others, for the purpose of paying the said annuities and money borrowed. To this the defendant replied, that the burial fees were insufficient to answer the purposes of the act, and that the

annuities granted by the act were in existence, and that it was necessary for the trustees to raise money by assessments in order to carry into effect the purposes of the act, and that the assessments were duly made pursuant to the act, and without stating that the rates were made for the purpose of paying the annuities and money borrowed, or any other purpose whatever.

At the hearing, the court observed, that there was a material distinction between this case and the cases cited, which were the cases of poor-rates. Overseers of the poor were at liberty from time to time to raise prospectively by rates, sufficient sums for the relief of the poor. These sums could not be specifically limited; for the overseers could not, *a priori*, say how much they would want for such a purpose. Here, on the other hand, the trustees were authorized by the act, in the first place, to raise a definite sum by loan or annuity, and then to raise by rate so much money as will be sufficient to pay either the common or annuity interest upon the sum borrowed, together with such sum as was sufficient to pay the salary of the clergyman. Their power of borrowing was limited; for the sum borrowed was not to exceed the sum of 30,000*l*. The act of parliament therefore gave a special power, and that power ought to be strictly followed, and as it authorized them to borrow a certain sum of money, and afterwards, by rates, to pay the interest of the money borrowed, they had no right to borrow beyond the specified amount, or to raise rates to pay interest upon any higher sum. There was a material distinction between this case and that of *Rex v. The Mayor and Burgesses of Gloucester*, 5 T. R. 346. There, the money to be raised was for the relief and support of the poor. The expence would vary from day to day; it was necessary in such cases to raise money prospectively, so that there might be always some in hand, in order to meet whatever demands might occur. In the present case, on the other hand, the parties were not warranted in raising money to the amount which would be raised by this rate. The party upon whom the distress had been levied was liable to contribute only an aliquot part of the sum authorized to be raised by the act. In this case the plaintiff was rated and distrained upon for more than he was by law liable to pay, and the defendant had no authority so to distrain upon him. For these reasons their Lordships were of opinion, that the distress was illegally taken, and held that the plaintiff was entitled to the judgment of the Court, which was given accordingly. *Ritcher v. Hughes*, 2 Barn. & Cress. 504.

Churchwarden.

Churchwardens are so far incorporated by law, as to sue for the goods of the church, and to bring an action of trespass for them, and also to purchase goods for the use of the parish; but they are not a corporation in such sort as to purchase lands, or to take by grant; except in London, where they are a corporation for those purposes also. *Gibb. Cod.* 215; and *Cro. Jac.* 532. But by 9 Geo. 1. c. 7, the churchwardens, with consent of the major part of the parishioners or inhabitants in vestry, may purchase houses to lodge or employ the poor in. As churchwardens cannot hold lands, if any one give land to the parish for the use of the church, it must not be to the churchwardens and their successors, but it should be to feoffees in trust to the use intended; which must from time to time be renewed as the trustees die away. *Gibb.* 215. By act of parliament, however, churchwardens are not uncommonly found incorporated with power to sue, and hold lands and tenements, and to convey or release such lands, &c. In a late case, an act of par-

liament empowered churchwardens to borrow money and assign over to the respective persons advancing or lending the same, all and every the houses, lands, tenements, &c. of or belonging to the corporation, and also all or any part of the poor-rates and assessments to be collected within the parishes, &c. as a security for the re-payment of the principal sums so borrowed, with interest; the plaintiff advanced to the corporation a sum of 2,000*l.*, the re-payment of which was secured to him by a mortgage, pursuant to the provisions of the act. On the mortgagees calling in their money, the mortgagors alleged, that their effects were insufficient to pay off the same, and that they were not authorized by the act of parliament to raise the principal by assessment in the events which had happened, and that the mortgagees having full knowledge of the only means provided by the act for re-payment, must wait till the time arrived when those means could be exerted. The act was evidently founded on the expectation of the corporation becoming rich, and imported, after the reduction of the annual expenditure, that rates should be levied for payment of the sums borrowed. From the great expence of maintaining the poor, the guardians had not been able to form any accumulation, and they rested their defence on the foregoing grounds. The Lord Chancellor, however, thought that the payment of the sums borrowed, was one of the purposes for which money was to be levied; three purposes were specified, payment of interest, maintenance of the poor, and re-payment of principal. His opinion therefore was, that if a mortgagee called for his money, and if the corporation could not find other means of repayment, they must make assessments, which must be adequate, first, to the maintenance of the poor; next, to the payment of interest to all the creditors; and lastly, to the payment of principal to the particular creditor who demanded it. They had involved themselves in this difficulty from a confidence that the case would never arise.

Jones v. Montgomery, Churchwardens, 5 Swan. 203.

CHAP. XXIII.

OF EQUITABLE MORTGAGES; VENDOR'S AND SOLICITOR'S LIEN;
MORTGAGES OF PUBLIC STOCK, COPYHOLD ESTATES, CO-
LONIAL PROPERTY, AND SHIPS; SECURITIES BY STATUTES
MERCHANT AND STAPLE; RECOGNIZANCES; CROWN DEBTS;
LEASE AND LOAN; BANKRUPTCY; EJECTMENT; ELECTION;
AND MERGER, WITH PRACTICAL OBSERVATIONS.

 BY THE EDITOR.

NUMEROUS observations remain to be made on various subjects connected with mortgage transactions, which it is proposed to arrange under the following sections:—

- I. Equitable mortgages.
- II. Vendor's lien for purchase-money unpaid.
- III. Solicitor's lien, and mortgages between attorney and client.
- IV. Mortgages of public stock.
- V. Copyhold mortgages.
- VI. Mortgages of colonial property.
- VII. Mortgages of ships.
- VIII. Securities by statute merchant, statute staple, and recognizance.
- IX. Lien of Crown debts.
- X. Lease and loan.
- XI. Cases in bankruptcy.
- XII. Rules as to ejectment.
- XIII. Doctrine of election.
- XIV. Merger of charges.
- XV. Practical observations to Attorneys in preparing mortgages.

SECTION I.—*Of equitable Mortgages.*

IN treating this subject, it is designed to consider, first, equitable mortgages by written, implied, and parol agreements; and, second, equitable mortgages by deposits of title-deeds.

FIRST. By an *express written agreement* to make a mortgage, a lien is created on the land in equity, on the principle, that what has been agreed to be performed shall be performed in specie. *Hankey v. Vernon*, 2 Cox, 12. Thus, where J. S. being about to mortgage an estate, upon which his younger brothers and sisters had charges, procured their concurrence in the conveyance, and in an acknowledgment of the receipt of their portions, gave them an undertaking, that he would grant them a subsequent mortgage and enter into no prior security; and he afterwards made a subsequent mortgage to the plaintiff, for money lent previously on bond, and a fresh sum advanced: it was held, that the claims of the younger children should have priority in equity, and should be preferred to the plaintiff's legal mortgage. *Becket v. Cordley*, 1 Bro. C. C. 352.

Express agreement to make mortgage, creates equitable lien.

So a covenant to set apart and pay annual profits of land, is in equity a lien on the land against the covenantor and claimants under him, with notice. *Legard v. Hodges*, 1 Ves. 477. In like manner the following paper, signed by the assignee of a mortgagor, who had already made a mortgage with trusts for sale, was considered a good equitable mortgage:—"As I am entitled to the benefit of any surplus, which may remain of the produce of the sale of the premises assigned by Edward Gifford to you by indenture, dated, &c. I authorize you to act and sell and pay yourself, out of that surplus, the sum of 250*l.* which is due from me to you, with lawful interest for the same, from the date hereof, for cash advanced to me [this day] on account of my interest in the said premises." *Hodgson's case*, 1 Glyn & Jam. 13. So a written instrument promising to pay a sum of money with interest, "out of the estate of the deceased W. H." and signed by all the persons interested in his estate, has been held to constitute (the personalty being exhausted) an equitable mortgage on the real estate. The case was shortly this:—William Hall, by his will, charged his real estate with the payment of his debts, and gave his wife a life interest in it. The reversion descended upon his eldest son. Upwards of twelve years after his death, the plaintiff advanced to the widow the sum of 400*l.*, and received a written instrument in the form and with the stamp of a promissory note, signed by the widow and all the children (by the heir at law among

the rest) whereby they jointly and severally agreed to pay on a given day the money so advanced with legal interest, "out of the estate of the late William Hall." The personal estate was exhausted; the heir had become bankrupt; and the bill claimed against his assignees, the benefit of an equitable mortgage on the real estate of the late William Hall, which had descended to the bankrupt. Vice Chancellor—The question here is, merely one of construction. Did the widow and children mean this instrument to create merely a personal obligation, or to operate as an agreement to affect the estate? They promise to pay *out of the estate of the deceased father*, that is, out of all the estate; and there being now no personalty, this instrument must be held to be an agreement to charge upon the real estate the money advanced. *Suart v. Toulmin*, MS. V. C. 9th November, 1822.

Agreement inferred from recital or covenant for further assurance.

An agreement to make a mortgage may be collected from the recital in a defective deed, of the intention of the parties to charge the land with the sum borrowed, or from the covenant for further assurance usually inserted in mortgage deeds, as in *Wills, Ex parte*, 2 Cox, 233, (S. C. but short and unintelligible, 1 Ves. jun. 162, et ante, vol. i. 523) where a bankrupt having mortgaged an estate for 400*l.*, afterwards borrowed a sum of money of the petitioner, and by way of security made a lease of the mortgaged premises to another person, and assigned the rent reserved on that lease to the petitioner, but did not convey to him the interest in the land. The assignees objected to the validity of this lease, contending that it was void, as being made by a mortgagor without the concurrence of his mortgagee. Lord Thurlow admitted the lease to be void as against the mortgagee, but declared it not so as against the lessor; and as to the assignment of the rent, though it was a very unusual mode of conveyance, yet as it recited the intention of the parties to make a security for the money borrowed, and there was a covenant for further assurance, the covenant in equity amounted to an agreement to make a mortgage; and, therefore, the case was within the rules of equitable mortgages. A similar decision is said to have been made in *Pye v. Daubuz*, as reported by Mr. Dickens, 2d vol. 759. But by Mr. Brown's report of the same case, vol. iii. p. 595, it appears that the plaintiffs claimed under a regular mortgage and not merely by an equitable title.

An express agreement to mortgage part of a larger estate, without specifying any particular part, will, as against subsequent incumbrancers with notice, be deemed an agreement to mortgage a part sufficient for that purpose. *Stuart's case*, 3 Ves. 576, cited. *S. C.* 2 Sch. & Lef. 381. But an agreement to make a mortgage when required, without any actual demand, will not of itself give the creditor any lien on the land. *Williams v. Lucas*, 2 Cox, 160. An agreement for a mortgage raises a specific lien against other creditors of the debtor or borrower. *Burn v. Burn*, 3 Ves. 582. As to priority acquired by equitable mortgages, see *infra*, this sec. div. 2. sub. div. 4.

Agreements to mortgage will, in most instances, be *implied* from defective assurances between debtor and creditor, lender and borrower. Where one lent 70*l.* to the defendant's uncle, and for his security took a warrant of attorney to confess a judgment, in ejectment for three closes of land on a feigned demise for twenty years, it was held, by the Lords Commissioners, Rawlinson and Hutchins, to be a defective security, nevertheless they allowed it to stand in equity as a good agreement to charge the land, and decreed it accordingly against the heir. *Dale v. Smithwick*, 2 Vern. 151. So where a debtor made an absolute conveyance to his creditor without any express consideration, it was presumed to be a mortgage and redeemable on payment of the money due. *Card v. Jaffray*, 2 Sch. & Lef. 374. It is by an implied agreement that the court raises an equity between debtor and creditor, when the former deposits deeds with the latter without verbally communicating the intent of such deposit, *vide infra*.

In a recent instance property was charged with a heavy incumbrance, the equity of redemption of which was settled to A. for life, with remainder to B., who took upon himself to sell the estate as owner, saying that A. would concur. A draft conveyance was prepared, in which both A. and B. were made parties, and the purchaser was let into possession. The purchaser rather prematurely perhaps cleared the estate of the charge, to the interest of which at least, the tenant for life was liable. The tenant for life then refused to concur, and com-

Stranger paying off incumbrance obtains equitable lien.

menced an ejectment for the possession. The purchaser filed his bill for the establishment of an equitable lien to the amount of the incumbrances discharged, and to enjoin the tenant for life from proceeding in his ejectment until the incumbrance was discharged.

RICHARDS, C. B.—It is clear that an existing charge on the property has been discharged by the plaintiff, and that the defendant has had the benefit of that discharge. The plaintiff has therefore an undoubted lien at least, and from the result of his dealing with the incumbrancer, is in a situation to be entitled to be considered, under all the circumstances, as a mortgagee as against the defendant. The question, whether the defendant is only, as he says, liable to keep down the interest, must be discussed in a more formal manner; but, in the mean time, we cannot suffer him to turn the plaintiff out of possession by the effect of the proceedings at law, merely because his title is only an equitable one, when it is not denied that he or the remainder-man, through his means, have cleared the defendant's estate from the charges to which it was undoubtedly subject. *Ludlow v. Grayall*, 11 Price, 58.

Contract and
lien distin-
guished.

A., being indebted to B., enters into a written agreement, that B. may, at any time, while the money due to him remains unpaid, become the purchaser, for 450*l.* of a house belonging to A., and that the money due to B. from the latter shall be in part payment of the price: this is a contract of sale, and not a mortgage to secure the debt; and B. having duly declared his option to become the purchaser, was held entitled to have the agreement specifically performed. *Bunning v. Bunning*, MS. V. C. Michaelmas, 1822.

Parol agree-
ment to mort-
gage, not bind-
ing.

With respect to *parol* agreements for a mortgage, the statute of frauds (29 Car. 2. c. 3.) enacts, that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof be in *writing* and signed by the party to be charged therewith, or some other person thereunto lawfully authorized. The consequence is, that a

parol agreement to execute a mortgage will not be binding on the party to be charged therewith; and though we shall presently observe that a deposit of deeds with a *parol* stipulation to perfect a legal security, will be sufficient to charge the party with an agreement to execute a valid mortgage, yet we shall also perceive, that a deposit alone, without any such *parol* contract, will of itself be evidence of an agreement executed for a mortgage of the estate. It is, therefore, not so much on the ground of a *parol* understanding between the parties, as upon the equitable effect of the deposit that a lien on the land is created. And it is acknowledged, on all hands, that the deposit itself, when made for the purposes of security, and not *diverso intuitu*, is equivalent to an agreement in writing, or at least to such an agreement as will support the creditor's bill in equity for a conveyance of the legal estate. To put a case of pure oral contract—if A. agree with B. in presence of their common solicitor, to make a mortgage for a sum which B. advances, or for a debt due from A. to B., and A. delivers to the solicitor title-deeds to assist him in preparing the mortgage, which is prepared accordingly, yet A. may resist specific performance of his contract, and B. will have no relief in equity. *Cooke v. Tombs*, 2 Anstr. 420; and *Cass v. Waterhouse*, Pre. Ch. 29. For a full view of the learning on *parol* agreements, the reader should consult the third chapter of Sug. Ven. & Pur. p. 61, 5th edit.

SECOND. The case of *Russell v. Russell*, presently mentioned, is generally supposed to be the first which established the doctrine of equitable mortgages by deposit of title-deeds; see Tho. Co. Litt. 36, n. (z); but that of *Fitzjames v. Fitzjames*, Finch, 10, (25 Car. 2. 1673) bears the stamp of greater antiquity. It speaks of the rule in familiar terms, decreeing without hesitation, that the benefit of the lease and trust deed ought to go to the plaintiff, upon payment of 700*l.* to the defendant, for which the said deed remained with her as a security; and that the said lease should, after payment of the money, attend the inheritance, and be left with the Register till the 700*l.* was paid, and then to be delivered to the plaintiff, and that the Master should direct and settle the assignment. Hence, it may be inferred, that the doctrine of equitable mort-

Antiquity and progress of doctrine of equitable mortgages by deposit.

gages is a very ancient head of equity. Before the decisions on this subject, the statute of frauds, 29 Car. 2. c. 3. s. 3. said, that no estate or interest in land, either of freehold or for a term of years, should be granted or surrendered, unless by deed or note in writing, signed by the party or their agents, or by operation of law. The object of the statute was to prevent the admission of parol evidence and the occurrence of such contradictory statements as leave the mind of the Judge in perfect doubt as to what the nature of the alleged agreement really is. Shortly after the statute, the court would not allow (even if all the parties were consistent in their statement) a parol contract to be established; because if they did so in a clear case, they must have done so in a case less clear, till at length agreements would have depended on a mere question of swearing. Prior to the cases on equitable mortgage by deposit of muniments of title, the party having the deeds had a right to say he had an interest in the deeds, but he was not allowed to contend that he had any interest in the land. A person with such an interest might have said, "as you cannot part with your estate without paying me, I will, by means of that embarrassment, work out my own satisfaction;" per Lord Eldon, in *Whitbread, Ex parte*, 1 Rose, 300. S. C. 19 Ves. 212. The surprise then was, how the court could admit the deposit of deeds to be evidence of an agreement for an interest in the estate, in the teeth of judicial decisions, that a lien on deeds might exist without giving any right at law to the land. There is a remarkable case (*Head v. Egerton*, 3 P. Wms. 279, acknowledged in several recent cases, *Evans v. Bicknell*, 6 Ves. 191. *Cawthorne, Ex parte*, 1 Glyn & Jam. 242) where a prior incumbrancer was held to have the legal interest in the estate; but the court would not take away the deeds from a subsequent incumbrancer without notice, and allowed him all the benefit he could derive from those deeds, nevertheless giving him no interest in the estate. *Kensington, Ex parte*, 2 Ves. & Bea. 83. But the mere possession of deeds will not afford a creditor this handle, if they were not deposited for the express purpose of security. 1 Turn. 274. What benefit a creditor may derive from this bare possession of the deeds without any lien on them, or interest in the lands, or how he could embarrass a prior incumbrancer, is not clearly defined. Lord Eldon

*Lien on deeds,
without lien on
land.*

has several times alluded to this question, but always declined entering into merits. In a late case it occurred, but his Lordship being clear on other points reserved his opinion for the time, when the question should arise in a *cause*. *Cawthorne, Ex parte*, ubi supra. The doctrine of equitable mortgages by deposit, is now, however, permanently established, as the succeeding cases will fully prove.

After reviewing the elementary principles of this species of mortgage, it may be useful to inquire, *First*, What will amount to a sufficient delivery; *Second*, Whether a delivery of copies of court roll will create any lien; *Third*, What advances, whether future or prior, will be covered by the deposit; *Fourth*, What priority is acquired by an equitable mortgage. 1°. As it regards the crown, and 2°. As it relates to the subject; *Fifth*, Whether an equitable mortgage may be assigned or foreclosed; *Sixth*, How the bankruptcy of the mortgagor will affect the security; and, *Lastly*, Whether an equitable mortgagee praying a sale will be liable to costs. *Plan of inquiry.*

The leading decision on this head of equity, is that of *Russell v. Russell*, 1 Bro. C. C. 269, where A. pledged a lease to the plaintiff for money lent, and other monies then due, and afterwards became bankrupt; upon which the pledgee brought his bill for a sale of the leasehold estate, alleging, that the bankrupt at the time of the deposit promised to execute an assignment when required; and that the assignees had sold the premises to some of the other defendants by auction, after notice to all parties of the plaintiff's claim. The case came on before the Lords Commissioners Loughborough and Ashhurst; the former of whom said, that as it was the case of a delivery of the title to the plaintiff for a valuable consideration, the court had nothing to do but to supply the legal informalities; in all these cases the contract was not to be performed, but was executed. Mr. J. Ashhurst thought it was open to explanation, and suggested the propriety of directing an issue, to try whether the lease was deposited as a security for the sum advanced by the plaintiff to the bankrupt, which was directed accordingly. Upon the trial, the jury found that the lease was deposited as a security. The reporter adds, that he *Deposit of deeds, a contract executed.*

Whether it be for security, triable by jury.

had been informed that this cause came on afterwards before Lord Thurlow, on the equity reserved, when his Lordship ordered the lease to be sold, and the plaintiff paid his money; see accordingly, 9 Ves. 117.

Doctrine not to be extended.

[1052]

This decision has met with universal disapprobation, because (according to the language of my Lord Eldon) it was a virtual repeal of the statute of frauds; nevertheless, it has been always acted on, and each succeeding case has added stability to a decree which it has previously pronounced to be settled on a spurious principle. The virulent tone of censure unremittingly passed on the doctrine under consideration, throughout the numerous cases on this subject, cannot but excite surprise, (especially when connected with the consequent diminution of stamp duties) that it has not yet attracted the notice of the legislature. Lord Eldon has expressed his determination not to extend the equity beyond its present limits, though, as far as it has gone, he has acknowledged himself bound by the existing authorities. In one case he declared, that the statute was not to be repealed by him farther than it had been hitherto repealed by his predecessors, to whose authority he submitted. *Whitbread, Ex parte*, 1 Rose, 300. S. C. 19 Ves. 212. In another case the same noble Lord lamented the decision in *Russell v. Russell*, because it led to a discussion on the truth and probability of evidence, which it was the very object of the statute of frauds entirely to exclude. *Haigh, Ex parte*, 11 Ves. 403. In *Finden, Ex parte*, Lord Eldon further expressed his disapprobation of the doctrine, and declared that a deposit of deeds should not be considered as a mortgage, except in a clear case, and refused so to treat it in that instance. The circumstances, however, are not stated on the report. 11 Ves. 404, n. (a).

Lien created by deposit, without word passing.

The deposit of title-deeds is evidence of an agreement executed for a mortgage, and an equitable title to a mortgage is, in the court of Chancery, as good as a legal title in a court of law. *Wright, Ex parte*, 19 Ves. 258. A mere deposit, without a single word passing, will amount to an equitable lien on the land, if it be connected with a transaction of lending and borrowing, or be made by a debtor with his creditor. *Kensington*,

Ex parte, 2 Ves. & Bea. 88. *Mountford*, *Ex parte*, 14 Ves. 606. *Monkhous v. Corporation of Bedford*, 17 Ves. 381. *Langston*, *Ex parte*, *ibid.* 230. The court, in this instance, presumes an agreement, on the ground that the deposit could be for no other purpose than as a security for the debt or sum advanced. But parol evidence is admissible to rebut this presumption, and to shew that the deeds were delivered for some other purpose. But the bare denial of the mortgagor that the deeds were not deposited by way of equitable lien, will not, it seems, amount to such evidence. *Cawthorne*, *Ex parte*, 1 Glyn & Jam. 240.

A purchaser gave the vendor's bankers, in whose hands the title-deeds of the estates were, an undertaking to give them his acceptance at a specified time for a sum then due to them from the vendor: after the time specified, but before he had given his acceptance, he had notice of incumbrances on the estate; it was held, that as against the incumbrancer, he was not a purchaser for a valuable consideration *without notice*. The circumstances of this case were shortly these:—Naylor executed a mortgage in fee of estates, partly freehold and partly copyhold, to M.; but as M. was closely connected with him by affinity, and for some years previous to his death resided in Naylor's house, Naylor had always retained the title-deeds in his possession. Being indebted to his bankers, Skinner & Co., Naylor put these title-deeds into their hands for the purpose of being held by them as an equitable mortgage to secure advances of money made to him. Skinner & Co. sent the deeds to their solicitor; and upon being informed by him of the incumbrance with which the estates were already charged, refused to accept them as a security. They continued, however, to keep the deeds in their possession, and it was sworn in the answer that they had them as an equitable mortgage. Naylor then applied to his relation, Tait, to purchase the estate in question, without informing him of M.'s mortgage. The result was, that Tait gave a written undertaking to Skinner & Co. to give them, on having these deeds delivered over to him, his acceptance for 1500*l.* (then due to them from Naylor), if the money was not paid by Naylor on or before the ensuing Christmas. Naylor did not pay the money

at Christmas. After Christmas, Tait received notice of the previous mortgage of the premises to M.; he afterwards gave his acceptance, according to his undertaking, and paid the money; Naylor became bankrupt: and the bill was filed by the personal representatives of M. for the satisfaction of the mortgage debt, or foreclosure of the mortgaged premises. Tait resisted the claim, on the ground,—that having given Skinner & Co. his written undertaking before he had notice of the mortgage, he was a purchaser for valuable consideration without notice. The Vice-Chancellor held, that Skinner & Co. could not have compelled Tait to carry into effect the written undertaking which he had given them. No consideration had moved from them. They had not even agreed to forbear claiming the money from Naylor in the mean time. Tait, upon the false representations of Naylor, who held himself out as the proprietor of that which in fact did not belong to him, agreed with him to purchase the estates, and with Skinner & Co., to give them his acceptance for 1500*l.*, as part of the price. Before he had actually given his acceptance, Tait discovered the fraud; and his undertaking could not have been enforced against him. The plaintiffs therefore were entitled to have the mortgaged debt satisfied. Tait had alleged in his answer, that M. had released the mortgage debt to Naylor. On this point an inquiry was directed. *Reid v. Tait*, MS. V. C. November 7th, 1822.

No lien by parol agreement to deposit.

Nevertheless, a mere parol agreement to deposit title-deeds as a security for a debt, without an actual delivery of the instruments to the creditor, will not confer an equitable lien. Thus, where a person having a renewable lease in his possession as equitable mortgagee, at the request of the mortgagor, delivered the same up to him for the purpose of obtaining a further term, and upon an additional advance it was agreed, that the further term should be a security for the original debt and the additional advances; but no delivery was made to the mortgagee of the lease when renewed for the further term, and the mortgagor became bankrupt; the court held, that there was a good mortgage of the original term, but that the parol agreement to deposit the further lease could give no title, and therefore dismissed the petition as to the further term. *Coombe*,

Ex parte, 4 Madd. 249. See *infra*, div. 3; as to parol evidence, and a further advance.

But though a deposit without a word passing will create an equitable lien, yet a written agreement is always recommended, as it entitles the mortgagee to costs on his petition for sale, and, according to Sir W. Grant, there is no case, where a man is willing to part with his title-deeds, in which he would not also be ready to sign a memorandum of two lines, specifying the purpose for which he has parted with them. *Norris v. Wilkinson*, 12 Ves. 197. Such writing, however, cannot be given in evidence without its being stamped, *Anon.* 2 Christ. B. L. 119, 2d edit.; and the 55 Geo. 3. c. 184, sch. 1, part 1, requires the same stamp as on a legal mortgage; but though there be an unstamped agreement between the parties which is inadmissible, yet other parol evidence may be adduced to shew for what purpose the deposit was made. *Hiern v. Mill*, 13 Ves. 114.

Written agreement recommended.

There can be no second equitable mortgage. Thus, where A. (the depositary of a lease for 400*l.*) filed a bill praying a sale in the usual manner. B. who had also lent the bankrupt 250*l.* on the same security, put in his claim, stating, that he went with the bankrupt to the counting-house of the petitioner, and there saw his principal clerk, and it was agreed between them, that as the petitioner was to advance the larger sum, he should have the possession of the lease, which, however, was to be likewise subject to B.'s claim. Lord Eldon declared, that he knew of no case that went the length of saying, that the mere deposit of a deed with one man should be evidence of his being a trustee for another. It might be otherwise where the depositary had himself advanced nothing; and if therefore there had been a concomitant advance on the part of the person so claiming to be *cestui que trust*, and a dealing with the estate connected with that advance, it might be considered as evidence, that the depositary advancing nothing, was a trustee. But his Lordship was at a loss to determine, whether the interest which the evidence sought to establish in the land, was prior to, or joint with, A.'s, or interposed between

No second equitable mortgage.

his two advances; and all this went to prove, that, departing from the rule given by the statute, there was no rule to go by; and it was essential that those who wished to render such securities valid should learn the utility of requiring two or three lines in writing. The order was confined to the sums advanced by A. only. *Whitbread, Ex parte*, 19 Ves. 215. *S. C.* 1 Rose, 301.

Tenant for life. The delivery over of deeds by a tenant for life will not create a lien on the estate by way of equitable incumbrance, so as to have the effect of charging the inheritance with any part of the money borrowed; but proof may be adduced to shew the remainder-man's assent to the deeds being deposited as a security of the money borrowed, or any part of it. *Williams v. Medlicot*, 6 Price, 495.

Registration. An equitable mortgage taken as a further security to an annuity at a subsequent period, need not be registered. It is not affected by the statute of frauds, nor is it within the provisions of the annuity act. And its not being a grant, but a mere engagement without deed, it cannot be requisite that it should be registered. *Price, Ex parte*, 1 Buck. B. C. 221, et vide ante, 621, n. (K).

Equitable mortgages must take assignment. It is also observable, that where a person has taken the deposit of a lease as a collateral security, he will be decreed to take an assignment of the term, and so become charged with the reserved rent and covenants. *Lucas v. Commerford*, 3 Bro. C. C. 166. *S. C.* 1 Ves. jun. 235, and acknowledged as good law, 6 Price, 461. As to the particular covenants to be inserted in such assignment, see *Pember v. Mather*, 1 Bro. C. C. 53. *Staines v. Morris*, 1 Ves. & Bea. 8. *Williams v. Fry*, 1 Meriv. 244, 263, 264, et ante, vol. i. p. 192, n. (m). And it should be observed, that the deposit of the lease of a house as a security for re-payment of a sum of money lent to the lessee, is not a breach of a covenant that the lessee shall not let, set, assign, transfer, set over, or otherwise part with the premises, or the indenture of lease or his interest therein. *Doc, dem. Pitt v. Hogg*, MS. K, B. 1824, May 5.

We now proceed to inquire, *first*, what will be a sufficient delivery to bring the case within the doctrine of equitable lien; and 1°, it may be remarked, that a banker will acquire no lien on muniments casually left in his counting-house, after he has refused to advance money on them. *Lucas v. Dorrein*, 7 Taunt. 278; *S. C.* ante, vol. i. p. 47; and if the borrower afterwards become bankrupts, his assignees may maintain an action of trover for the recovery of the muniments so permitted to remain with the banker. *S. C.* 1 J. B. Moore, 29. *S. P.* *Esdaile v. Oxenham*, 3 Barn. & Cress. 225.

Casual deposit
creates no lien.

So 2°, The possession of deeds delivered on the execution of a conveyance, which afterwards proves to be void, will not, it seems, confer an equitable lien on the land for the consideration money of such conveyance. Thus where the grant of an annuity was void for want of registration of the memorial, and it was contended, that the grantee having the deeds, was an equitable mortgagee, Lord Eldon, on petition, refused so to consider him; but if the mortgagee chose to file a bill, his Lordship would make an order to give him the full benefit of that species of proceeding, and, if he had the deeds in his hands, the assignees (the grantor having become bankrupt) would have great difficulty in obtaining them from him, but his claim as an equitable mortgagee was very different. *Wright, Ex parte*, 19 Ves. 259.

No lien by de-
livery of deeds
on execution of
void convey-
ance. *Semb.*

3°. The delivery of deeds to the pawner's wife, or other person over whom he has control, will not be a sufficient delivery of the deeds to create a valid equitable security. The case of *Coming, Ex parte*, 9 Ves. 115, turned on these curious circumstances. Previously to the bankruptcy of the borrower, the petitioner agreed to lend the bankrupt 1500*l.* for which purpose he sold out stock of that value, upon condition that the bankrupt should make a security by way of mortgage, to replace the stock within twelve months, and to pay the dividends in the mean time; in pursuance of this agreement, the bankrupt deposited title-deeds with his wife, who swore that the deeds from that time remained in a trunk of which she kept the key, until they were taken away by the messenger. One question was, whether this was an equitable

Deeds deposited
with mort-
gagor's wife,
and kept in se-
parate trunk,
not sufficiently
delivered.

*Agreement for
deposit kept by
mortgagor, no
avail.*

mortgage. Lord Eldon observed, that no case had gone the length of saying, that if the deposit were in the hands of a person who could fairly be called a third person abstracted from both, that that should not be considered a deposit for the creditor, provided such was proved to be the intention. But it was very delicate, when the deposit remained in the hands of the mortgagee himself; and the noble Lord doubted much, whether a mere memorandum, kept in the borrower's own possession, and not parted with, to the man in whose favor it was expressed, would take it out of the statute. It was very nearly the same, where deeds were put into the hands of the wife of the mortgagor to keep them as between her husband and the creditor. It would be too dangerous to hold, that the wife of the bankrupt could be considered a depository of the deeds for the debt of the petitioner, who therefore could not support his mortgage, but, with reference to the agreement to replace the stock at a particular day, the mortgagee should be at liberty to prove the amount of his debt. 9 Ves. 118.

*Unsettled whether all deeds
necessary to be
delivered.*

[1054]

4°. Whether delivery of *all* the title-deeds be necessary to constitute an equitable deposit, has not yet been finally settled. In *Wetherell, Ex parte*, 11 Ves. 398, A. agreed to deposit with his bankers the title-deeds of an estate for the balance of his account. He accordingly sent a bundle of papers to the banking-house of the petitioners (represented to be the title-deeds of that estate), which the petitioners put up without examination. They continued to make further advances until the bankruptcy of A.; after which, they discovered that the deeds related only to a moiety of the estate intended to be charged, and brought the title no further down than to the year 1725, the bankrupt having retained the other deeds, which fell into the possession of the assignees on his bankruptcy. A memorandum was also produced by the petitioners, written by A. and intituled, "A schedule of the annual value of the property of A., given in security to Messrs. M. & Co." The first article in the schedule was the entire estate in question. Lord Eldon said, there was sufficient evidence in writing (and on that he founded his decision) to raise an equitable mortgage on the whole estate. It had never yet been

decided how far it was necessary to deliver *all* the title-deeds; or whether that would not be taken to be a sufficient deposit, which could be taken, upon looking at the instruments, to amount to evidence that the estate was meant to be a security. If a person having the title-deeds of another, handed them over to a third person, there would be insuperable difficulty in getting them back from that person. But a mere deposit would *not bind the borrower to give an actual interest in the estate.* 11 Ves. 403. This latter position must now be considered untenable. It was expressly over-ruled in 6 Price, 458.

But the necessity of having the *whole* title-deeds may be fairly inferred from the late case of *Pearse, Ex parte*, 1 Buck. B. C. 525, though that case, it must be admitted, evades the precise point. A person who afterwards became bankrupt agreed with A. to execute a mortgage of certain premises for the security of a debt, and he sent (in order that A. might prepare the mortgage), all the title-deeds, except the immediate conveyance to himself. The bankrupt being also indebted to B. deposited that conveyance with him as a security for his debt, at the same time promising to send him the remainder of the title-deeds. Lord Eldon was of opinion (after much consideration) that neither the one nor the other of the depositaries had an equitable mortgage. The way in which they had been driven to frame the petition was, in itself, an argument of no little weight against them. But how far the assignees could get the deed from them, was another matter. It was enough to say, that the one was not intended to have a valid security till a legal conveyance had been executed to him, and that the other was not to have an equitable mortgage till he procured possession of the whole of the deeds. 1 Buck. B. C. 527.

Inferred from recent case that they must.

5°. It is requisite that the deposit be made with a view to an immediate security and not for any other purpose. The decision which first established this position was considered to have proceeded on a very refined principle and was much doubted at the time. It was this:—One Botville, a gunpowder-maker, had contracted with the defendant for as much

Deeds delivered to attorney to prepare mortgage, not an equitable deposit.

salt-petre as came to 224*l.* but not having ready money to pay for the same, proposed to make a mortgage of an estate he had in his own possession by way of security for the money; and in order thereto left with the defendant the title-deeds to get the assignment drawn; the defendant carried the deeds to an attorney, to look into the title, and draw the mortgage. The attorney kept them by him for some time, and then died without having drawn the assurance; after which the defendant carried the deeds to a scrivener for the same purpose; but before the assignment was perfected, the said Botville became bankrupt. The plaintiff (assignee of the commissioners) then brought his bill to have the deeds delivered up, that so the estate might be sold for the satisfaction of creditors, and Lord Cowper so decreed, with costs. *Brander v. Boles*, Gilb. Eq. Ca. 35. S. C. Pr. Ch. 375. A similar point was made in *Brisick v. Manners*, but at the hearing it was given up, and Lord Hardwicke thought rightly; for what had been done between the parties in writing was not by way of contract, but only as instructions to an attorney for a further act to be completed afterwards; and if this were to be decreed as the party's agreement in every case where a man had given loose instructions to draw articles, the party might be brought into Chancery for performance of the instructions as of articles themselves; a thing which could not be tolerated, 9 Mod. 284. This determination was followed by *Bulleel, Ex parte*, 2 Cox, 243, where Lord Thurlow declared, that the case before him did not come within the rule established by the Court, viz. that the deposit of title-deeds as a security for money shall be taken as a mortgage; for that here the deeds were not deposited expressly as a pledge for securing any particular sum, but were delivered to an attorney for the purpose of enabling him to prepare a security which was to be afterwards executed; but the bankruptcy intervening, prevented the transaction being effected, and his Lordship dismissed the petition, 2 Cox, 247. The deeds, in this case, were sent by the debtor to the creditor, and by him delivered over to an attorney with instructions to prepare a mortgage.

[1055]

This doctrine
confirmed.

The next case is still stronger in corroboration of the doctrine, that a deposit *diverso intuitu* will not create an equitable

lien. The case is that of *Wilkinson v. Norris*, 12 Ves. 192, where Sir W. Grant, M. R. in the course of his judgment said, that when the deposit is made at the same time that the money is advanced, there is little to be supplied with reference to the nature of the agreement; it being obvious that the purpose of the deposit must be to secure the re-payment of the money. But the connection was not so direct between a debt antecedently due and a subsequent deposit; nor was the inference so plain where persons in trade were dealing with each other on credit. Some debts were due: some contracted: but the term of payment not arrived. New dealings might every day give rise to new debts. Under these circumstances, what was to be gathered from the mere fact of a deposit of deeds; supposing the transaction to be of that nature? Was the deposit to be a security for the debt due only, or also for the debt contracted? The plaintiffs said, they were to have a security for every thing due or to grow due. The defendants contended that it never was in contemplation to give a security for more than the sum due. But the case before his Honor did not present an instance of equitable mortgage by deposit of deeds, for it was clear, the deeds were not delivered by way of deposit in the sense in which that word had been used in the previous decisions, viz. as a present and immediate security, but were delivered only for the purpose of enabling the attorney to draw the mortgage, which, it was alleged, the bankrupt agreed to give. In all the cases that had been referred to, the deeds were delivered by way of deposit. Such deposit was indeed held to imply an obligation to execute a legal conveyance whenever it should be required; but the primary intention was to execute an immediate pledge, with an implied engagement to do all that might be necessary to render the pledge effectual for its purpose. But here there was no intention to put the *deeds* into pledge; *that* was not the thing which the parties had in contemplation. 12 Ves. 200. So in the late case of *Hooper, Ex parte*, the reason why Lord Eldon refused a mortgagee liberty to treat the deposit of a deed of conveyance as an equitable mortgage, was because the contract under which he held such deed was a contract for conveyance only, and not for deposit. 1 Meriv. 9. It has likewise been holden at law, that if a policy.

*Economy of
equitable mort-
gage.*

of insurance is left in the hands of an agent, merely for safe custody, though he advances money to the assured without any other security than the policy, the agent acquires no general lien on the instrument for such advances; *sed aliter* if left with him as a security generally. *Muir v. Fleming*, 1 Dow. & Ry. N. P. Ca. 29. See also this doctrine acquiesced in by Ld. C. B. Richards, 6 Price, 468.

Deeds delivered expressly to prepare mortgage, evidence of intended lien.

Thus far an unbroken chain can be traced, but the next case presents us with a disjointed link:—A. claiming a lien by deposit of title-deeds, presented a petition for sale of the premises. It appeared in evidence that the deeds had been delivered to him, not as a security, but in order that a legal mortgage might be prepared; and that circumstance was relied on by the assignees in bankruptcy as an objection. The Lord Chancellor, however, over-ruled the objection, and ordered a sale, observing, that the principle of equitable mortgages was, that the deposit of deeds was evidence of an agreement; and if they were deposited for the express purpose of preparing a legal security, he asked, was not that *stronger than an implied intention*? Certainly it was, and that objection suggested itself to Sir William Grant, in *Norris v. Wilkinson*, but his Honor felt himself bound by authority, though it did appear inconsistent with reason. *Bruce, Ex parte*, 1 Rose, 374. The deeds, in this case, were delivered to the creditor himself, and not to a third person; so they were in *Bulkeel, Ex parte*, but the decision was different. There cannot possibly be a reasonable distinction on the trivial circumstance to whom the deeds are delivered.

Agreement to make mortgage proved by parol. Deeds delivered to prepare same, held to create equitable deposit.

It is necessary to add, that the case of *Edge v. Worthington* is to be found in the books, (1 Cox, 211) which appears to coincide with *Bruce, Ex parte*. The case was this:—The plaintiff being entitled to a share of personal estate, applied to the executor for payment of what was coming due; he paid a part, and being pressed for the residue, offered a security on his real estate. C., an attorney, then attended him on behalf of the plaintiff, and the executor agreed with C. to give the plaintiff a mortgage on a house in Manchester, and

promised to send the title-deeds to C., which he did accordingly. The mortgage was prepared, but before it was executed the executor became bankrupt, whereupon his assignees possessed themselves of the house in question. The plaintiff claiming to be mortgagee of this house, filed a bill for foreclosure in the usual way. Sir Lloyd Kenyon, M. R., after lamenting that the strict line of the statute had ever been departed from, said, that it had been supposed the present case fell short of the decided cases, but it seemed to him to be stronger. The circumstance of the deeds being deposited, left it to the court to infer an agreement, or *to admit parol evidence of the actual agreement*. Here *the parol evidence proved the actual agreement*. C. had from time to time, applied for a mortgage, and ultimately his proposal was acceded to; and the creditor promised to make a mortgage, and to send the deeds to the attorney for that purpose. When the deeds were sent the agreement was so far performed; and the deeds could not be obtained back, but on payment of the money. The Master of the Rolls therefore thought that this was a case out of the statute, the deposit of the deeds being such a circumstance of performance of the agreement, that a court of equity must decree it to be carried into execution, and declared that the transaction between the attorney and executor amounted to a valid agreement to execute a mortgage. 1 Cox, 211.

In these cases it is easy to discover a want of due attention to the distinction between a deposit, as an immediate pledge of the very deeds, and a delivery of them in conformity to an agreement, which being supported by parol only, is not binding, though it be partly performed; and there is a very essential and palpable difference between a deposit, in the present acceptation of that word, and an agreement accompanied with a delivery of deeds in part performance, in which latter instance, the previous agreement explains the purpose for which the deeds were delivered, and rebuts the presumed contract which would otherwise arise, that the deeds were handed over with a view to a present security. A reasonable doubt therefore may, it is respectfully submitted, be entertained of the authority of the two preceding determinations.

Two preceding cases questioned.

Deposit noticed at law, but delivery to prepare assignment, creates no lien there.

6°. The deposit of an original lease creates such a lien on the land as is noticed in a court of law. *Hawkins v. Ramsbotham*, 4 Campb. 121. S. C. 1 Price, 138. But mere instructions for an assignment will not, in a court of law, add to the value of the deposit, as appears by *Hankey v. Vernon*, where the court of King's Bench thought, that as to the value of the deposits, the facts proved at the trial, namely, the instructions for the assignment previous to the act of bankruptcy, were not sufficient to give the bankers a lien on the ships. 2 Cox, 13.

Deposit of another person whether any lien after adoption, and as to evidence of adoption.

A person, having the custody of the title-deeds of A. and acting under a power of attorney from A. which did not give any authority with respect to his real estates, deposited the title-deeds and contracted that a mortgage should be executed by A. to secure the repayment of money advanced to his agents and applied to the purposes of a partnership in which he was concerned:—The question was, what should amount on the part of A. to a subsequent adoption and ratification of this transaction. The defendant, Mannings, previous to his departure for India, on some mercantile speculations, executed a power of attorney, constituting his wife, together with B. and R. his attornies, and authorising them to act for him as such in a great variety of matters specified in the power. Mannings was owner of certain real estates in Essex, the title-deeds of which were left in the custody of his wife. R. one of the three persons named in the power of attorney, was a partner of Mannings, and also a director and trustee of the Hope Insurance Company. During his absence, it was thought desirable, that money should be raised by the mortgage of the estate of Mannings, and it was imagined that under the power of attorney Mrs. Mannings together with B. and R., had authority to make such a mortgage. An application was accordingly made to the Hope Insurance Company, who agreed to advance 12,000*l.* upon the security of the Essex property. The money was advanced. Mrs. Mannings deposited the title-deeds of her husband's estate with the Company, and she, with the two persons joined with her in the power, covenanted that Mannings should, upon his return to England, execute a legal mortgage.

Information of this proceeding was communicated to Mannings while in India; he was dissatisfied with it, and, in his letters to his wife, blamed her for having, under any circumstances, consented to part with the title-deeds of his estate. He had given her express injunctions to the contrary. None of the parties, however, were aware, that there was any legal objection to the validity of what had been done. The mortgage deeds which were sent out to him for execution did not reach him; they were never executed. Mannings, upon his return to England, found himself involved in temporary pecuniary embarrassments; and entered into a negotiation with the Hope Insurance Company for a farther loan. In the course of the negotiation he wrote a letter, addressed to the directors of the Company, in which were the following words: "Being desirous to raise a sum of money to discharge some engagements entered into by myself and others, I propose to borrow from your honorable Company a sum of 6000*l.* to be secured on my Essex property, *which you now hold*, in addition to the sum of 12,000*l.* already advanced by your honorable Company, and secured thereon." The negotiation was ineffectual: the Company would make no further advances. Mannings then insisted that the Company had no security on his Essex estate; for the power of attorney did not extend to the mortgage of his estates, and therefore the alleged mortgage was, as to him, totally inoperative. The legal interest was in him, and the Hope Insurance Company having lent their money on an invalid power of attorney, had no equity to entitle them to call upon him for a conveyance.

VICE CHANCELLOR:—This case lies within a very narrow compass. Under the power of attorney, Mrs. Mannings, and the two gentlemen who acted with her, had, I am inclined to think, no authority to execute a mortgage of the estate in question. But the question now is, not whether their act bound the defendant originally, but whether the defendant, being acquainted with the fact that they had taken upon themselves to pledge his estate, has not, with a full knowledge of all the circumstances, ratified and approved their act. The letter which has been read, and which is admitted in the answer, removes all doubt. In it he expressly states that the Company

hold his Essex estate, and that the sum of 12,000*l.* advanced by them is secured on it. This is clear proof that he did adopt the act of the persons whom he had constituted his attornies. The consequence is, that the Hope Company are equitable mortgagees, and that a receiver must be appointed. *Hope Insurance Company v. Mannings*, MS. V. C. 18th Dec. 1822.

Equitable mortgage by deposit of copy of court rolls.

Second. It was proposed to inquire whether the delivery of copies of court roll will create any lien on the lands. In the only case on the subject, it was contended that copies of court rolls were not title-deeds, but mere abstracts, and might be had from the steward of the manor by applying for them, so that two or more persons might claim an equitable lien in respect of the same estate. But Lord Eldon could not distinguish the cases, and permitted the depositary of the copies to take an order for sale, subject to an inquiry as to the amount of his debt. *Warner, Ex parte*, 1 Rose, 287. *S. C.* 19 Ves. 202.

Deposit will cover future advance, if supported by evidence, or oath, uncontradicted.

Third. An equitable mortgage by deposit of deeds may be extended to *future* advances by implication [*quære*] or parol agreement, and though the original delivery be to secure a sum of money to a particular firm or company, yet, on a change of partners, the deposit may be construed to embrace future advances by the new firm, without a re-delivery of the deeds. But in this case, a mere understanding between the parties will not alone be sufficient unless it amounts in a fair sense to an agreement. *Kensington, Ex parte*, 2 Ves. & Bea. 79. *Norman, Ex parte*, 2 Christ. B. L. 121. 2d edit. and where title-deeds are deposited by way of security with a firm upon a verbal agreement, the deposit may be extended by a subsequent verbal agreement for the security of a new sum upon a change of partners. On this occasion, his Honor, the Vice Chancellor observed, that he was desirous of having an opportunity of carefully examining all the prior cases upon the subject, in order that he might be quite sure that he was not extending a principle which is in direct opposition to the wise provisions of the statute of frauds. But there was authority sufficient to support the lien in the present case. In *Ex parte*

Kensington, the Lord Chancellor expressly stated, that he had gone the length of holding, that where a deposit was originally made for a particular purpose, that purpose might be enlarged by a subsequent parol agreement: and the effect of the judgment in *Ex parte Kensington*, his Honor took to be, that an agreement, written or verbal, (not being by deed) may be extended by parol. The case before him was plainly within the doctrine laid down by the Lord Chancellor, and the petitioners were entitled to the usual order for a sale, which was made accordingly. *Lloyd, Ex parte*, 1 Glyn & Jam. 391. His Honor however, omitted to notice, and the counsel to cite the case of *Strange v. Lee*, 3 East, 484, whence it might have been inferred, that a deposit with A., B., and C., would not cover advances with A., B., and D., without proof that it was made for the benefit of all future partners. But that inference must give way to decision. In a subsequent case, an agreement by way of deposit of title-deeds with a firm of five, one of whom was a nominal partner only, was extended by subsequent agreement to the actual partnership of four. *Alexander, Ex parte*, 1 Glyn & Jam. 409.

Where A. borrowed 4000*l.* of B. on the deposit of title-deeds, and afterwards obtained from him a further advance, and then became bankrupt, ratifying however (after the bankruptcy) the deposit as well for the sum originally borrowed as for the subsequent advance, B. was declared entitled to a lien for the whole amount, Lord Eldon observing, that as the court would infer from a deposit, that the money then advanced should be charged as if there were a written agreement, there was no doubt that if it were made out on oath uncontradicted, additional advances might also be charged. *Langston, Ex parte*, 17 Ves. 227. *S. C.* 1 Rose, 26. Some doubt seems to have been entertained by the Master of the Rolls on this point, in *Norris v. Wilkinson*, 12 Ves. 192, and in *Vandersee v. Willis*, 3 Bro. C. C. 21, it was held that bankers having securities deposited with them as a pledge for a certain sum, should not be allowed any thing beyond that sum, though the depositor at his death be indebted to a larger amount. But the above is now the prevalent opinion of the profession.

Inquiry directed whether deposit will cover subsequent advance.

If the creditor by his bill, or in case of his debtor's bankruptcy, by his petition and affidavit, insist that the deposit was made as a security for future advances, as well as for the debt then due, and the debtor by his answer to the bill, or by affidavit in bankruptcy, deny the fact, the court will direct an inquiry to be made by the Master or the Commissioners, in respect of what debt the deposit was made. In which case resort may be had to parol testimony. *Mountfort, Ex parte*, 14 Ves. 606.

Corollary.

From these cases it may be collected, that if A. deposits deeds with B. for safe custody and afterwards becomes indebted to B. in a sum of money, and nothing transpires as to the deeds, B. will not be at liberty to retain the deeds till the money be repaid; but he will be allowed to adduce evidence to shew that it was agreed he should so retain the deeds, or his oath uncontradicted will produce the same effect.

Legal mortgage not extendable by parol to embrace additional loan.

If a legal mortgage be made as a security for debts to be contracted to a stipulated amount, that limit cannot be enlarged by a parol agreement. *Norman, Ex parte*, 2 Christ. B. L. 121. So a legal mortgage cannot by parol be made to embrace future loans to the same mortgagor. Thus, in *Hooper, Ex parte*, 2 Rose, 328, there was a legal mortgage for 400*l.*, and a further sum afterwards advanced, for which the mortgagor agreed to execute a mortgage, and in the mean time the additional sum was to be considered as tacked to, and included in, the former security. The interest was from time to time paid on both sums; a further mortgage was not executed; the mortgagee died, and the mortgagor became bankrupt. The petitioner, who was the executor of the mortgagee, prayed that the mortgaged premises might be sold and applied in payment of both sums; but the petition was dismissed, with liberty, however, to file a bill. 1 Meriv. 7. By Mr. Vesey's report of the same case, it appears that Lord Eldon spoke as follows:—"With great deference to Lord Thurlow, I repeat, that the case of *Russell v. Russell*, 1 Bro. C. C. 269, ought not to have been decided as it was. The vice of that decision is, that it supposes that the deposit can refer to nothing but an intention to subject the estate. To that I do not agree. A

deposit of title-deeds may be of considerable use without any such object. The right to hold them, and so to work out payment, is of great value; and there are many cases in which that right may be maintained against all the owners of the estate. That decision, however, has been repeatedly followed, and it must not now be disturbed. Without saying whether, in the case of a parol contract for the sale of an estate, payment of the whole price would be a part performance that would support the contract; my opinion is, that, where the contract is for a mortgage the advance of the whole sum cannot have that effect," and, "I say, confidently, that there never was a case, where a man, having taken a mortgage, by a legal conveyance, was afterwards permitted to hold that estate as farther charged, not by a legal contract, but by inference from the possession of the deeds. The other cases have gone far enough, indeed too far; and I will not add to their authority, where there are circumstances distinguishing the case before me." The order was consequently confined to the legal mortgage. 19 Ves. 480.

Effect of possession of deeds not as deposit.

As to *previous* advances, if a lease be deposited with a person generally, and he afterwards admit, to a third party, that the lease was so deposited for the security of any advances which he may subsequently make, the testimony of that third person will prevent the deposit becoming a lien for any debts owing from the depositor to the person having the custody of the lease at the time of deposit.

No lien for previous advances.

A general deposit is in itself evidence that it was made for the purpose of securing more; *that* was laid down by Lord Thurlow, upon the notion that the deposit could be made for no other purpose; but the tenor of all the cases is, that that doctrine is not to be carried further. It has never been held, that if deeds are carried to a person for the purpose of obtaining credit from him, he has a lien upon them for what is due to him in respect of monies theretofore advanced. The Lord Chancellor therefore confirmed a decree of the Vice Chancellor, declaring that the party holding deeds for obtaining credit, and no advances having been made on that credit, had no lien

upon the deeds for what was due to him in respect of monies previously advanced. 1 Turn. 279.

*Previous
advances.*

If, however, the memorandum accompanying the deposit, shew that the lien was intended to have a retrospective as well as a prospective operation, the previous advance will be allowed. Thus, in a late case, Tells, who afterwards became bankrupt, entered into a bond for securing to four gentlemen of the name of Alexander, and Spooner, which five individuals constituted a banking firm, all sums which were, or might thereafter be, due from him to the bank, to the extent of 2000*l.* and interest. On the back of the bond there was an agreement, that the title-deeds of certain premises, deposited with these five persons, should be a collateral security with the bond. In 1821, (Spooner being then dead,) Tells entered into a second bond to the four Alexanders, for securing to them all sums due, or which might become due, from him to them, not exceeding 1000*l.* and interest; and upon this bond there was an indorsement, that the same title-deeds were to be a collateral security for that sum of 1000*l.* in addition to the former bond.

The four Alexanders, thus carrying on business at the time of Tells' bankruptcy, claimed a lien on these title-deeds for the amount of the general balance due to them from Tells.

The argument against their claim was the following:—The bond to the five is to be considered as discharged; for Spooner having died in 1819, the bankrupt continued his dealings with the four Alexanders, and the payments made by him to them were (on the authority of *Clayton's case*, 1 Meriv. 530,) to be first applied in discharge of the bond to the five; so that the first bond would be wholly satisfied, and the only claim of the bankers will be on the second bond. It was not denied that such would be the result, provided Spooner had been substantially a partner; but it was said, that in truth, he was only a nominal partner, and that therefore *Clayton's case* had no application here; because the doctrine of that case was founded on an equity to be applied between the surviving partners, and a deceased substantial partner.

It appeared to the Vice-Chancellor, that this question did not arise here. The first deposit of the title-deeds could be treated only as a security collateral to the bond. The words in the first memorandum, "which deeds I do hereby pledge, as a collateral security for the due payment of the within obligation," shewed that the estate was to be a collateral security for all monies due from the bankrupt under the bond. Then the indorsement on the bond of 1821 stated, "that the deeds were to be left as a collateral security with the Alexanders, for the payment of the 1000*l.* mentioned in the bond, in addition to the former bond." In other words, the deeds were to be a security to the four Alexanders for advances to the extent of 1000*l.* and interest, in addition to their being a security to the extent of 2000*l.* for advances made, or to be made, according to the intention of a former obligation. Here, then, was to be found an express agreement, that the four Alexanders should have the benefit of this deposit, as well for the sum of 2000*l.* as for the sum of 1000*l.*; and it became unnecessary to enter into the general question which was discussed in the argument. *Alexander, Ex parte*, MSS. April 12-28th, 1824, at 1 Glyn & Jam. 409.

Fourth. We pass on to the subject of priority, and remark, 1^o, that an equitable mortgagee by deposit, will acquire priority against the crown for a simple-contract debt found due by inquisition after the date of the deposit, if the loan advanced by the mortgagee be for an honest purpose. Thus, in *Casberd v. Attorney-General*, 6 Price, 411, the plaintiff lent Jones (a collector of taxes, and afterwards a defaulter,) a sum of 1000*l.* secured by bond, and the deposit of deeds. The bond recited, that the title-deeds to the houses in question, had been delivered by Jones to the plaintiff by way of deposit for 1000*l.* and interest. The integrity of the transaction was admitted,—there being no suggestion thrown out by the evidence, or otherwise, that the plaintiff knew any more of Jones's situation, than any stranger might have known. One question was, whether a deposit of deeds would affect the crown? It was admitted by the Chief Baron, (citing *King v. Mainwaring*, 2 Price, 67) that if there had been a conveyance of an equity of redemption, it would have

Deposit constitutes equitable lien against crown.

conferred a good title against the crown; but very considerable difficulty, added his Lordship, occurred from doctrines which were to a certain extent well settled, viz. that there could be no *equities* against the crown, and that the crown could not, generally speaking, be considered a trustee. If the crown had acquired the legal estate, there was no way of obtaining it out of the crown's hands for the benefit of a person who would have been a *cestui que trust*; but it was not so in the present case; the crown had no estate at all; the estate had never passed over, it was yet *in medio*, and it was the money only arising from the sale of the estate which in the present case was in dispute. Then the plaintiff being equitable mortgagee, was of course entitled to be paid before the crown, if his title, in point of time, were anterior to that of the king.

Debtor to crown by simple contract and record, distinguished as to legal and equitable mortgage.

It was in the next place necessary to inquire, whether Jones was a debtor to the crown by simple contract or by record. If he were a debtor to the crown of record, or one of the persons described in the 13 Eliz. c. 4. s. 1, there was no doubt that, whether there were an equitable or legal mortgage on his lands, it would not have affected the crown; for the crown would have a right, the moment he became a debtor of record; or came within the statute of Eliz., to have seized his lands, although they should have been subsequently mortgaged. But if he was not a debtor on record, (as he clearly was not, for his debt was never put on record), nor had given bond to the crown, and if he was not within the statute of Eliz., then he was merely an ordinary simple-contract debtor, and the crown had no right to the estate at the time of the equitable incumbrance, nor until he became a debtor by record, which he did not until the inquisition was taken, and that was not till a considerable time after the deposit was made; and indeed it was not even alleged, that he was a debtor of record at that time. Under these circumstances the decree should be for the plaintiff. 6 Price, 477. *S. C.* at considerable length, Dan. 238.

Equitable mortgagee not preferred to crown, if his conduct dishonest.

If, however, the advance be for the express purpose of upholding a failing collector till he becomes further involved, the court will consider the loan as founded in fraud, and will not lend its assistance to the deposit whereon it was intended to be secured. In *Broughton v. Davis*, the court said, the

loan for which the plaintiff had a deposit, was an unjustifiable endeavour to sustain the apparent credit of the defendant, a sinking receiver. The evil consequence of which was, that Davis was enabled to go on as a collector, and to impose himself on the public as a responsible man, and he continued to involve the parish, who might have been very considerably relieved if the extent had issued when he first became unable to pass his accounts; but upheld by the plaintiff, he was encouraged to plunge further in debt to the crown, which but for that undue assistance he could not have done. The Barons therefore were of opinion that the plaintiff could not sustain his equitable mortgage, and dismissed his bill. 1 Price, 223, 4.

2^o. A prior equitable mortgagee will be preferred to a subsequent mortgagee of the legal estate, if the latter have notice of the former deposit. Thus, in *Birch v. Ellames*, 2 Anstr. 427, title-deeds of an estate were deposited with the plaintiff as a security for his demand. The defendant, fourteen years afterwards, upon the eve of a bankruptcy of the mortgagor, took a mortgage, antedated a month, to prevent the appearance of its having been done in expectation of the bankruptcy. The defendant by his answer admitted, that upon executing the mortgage, he inquired for the deeds, and was informed of their being in the hands of the plaintiff (as he understood) for safe custody only. Lord C. B. Macdonald observed, that the presumed agreement on an equitable mortgage by deposit, was to be carried into execution by the court against the mortgagor, or any claiming under him with notice, either actual or constructive, of such deposit. The defendant in the present case, though he inquired for the deeds, cautiously avoided asking the reason of the deposit. The court was therefore of opinion, that he avoided acting in the usual way, on purpose to have a pretence of want of express notice, and if this defence could be sustained, no equitable title could ever be made good against a subsequent purchaser. For these reasons the decree was, that the defendant should pay the demand of the plaintiff, or stand foreclosed.

Equitable preferred to legal mortgage with notice.

The preceding case raised a question, whether a subsequent legal mortgagee, without deeds and without notice, would be

Secus, if legal mortgage made without notice

the retainer by the bankrupt of the lease and assignment, was a fraud, and should not enure to the prejudice of his creditor; and C. having an equity only, could give no better title to the assignees. *Meux, Ex parte*, 1 Glyn & Jam. 116; confirmed on appeal, ib. 240.

It may not be misplaced to observe here, that the deposit of a lease of land will affect all houses and buildings erected thereon, although in one case it was attempted to confine the lien of the deposit to one house erected on the land at the time of the deposit. 1 Turn. 276.

Equitable transfer.

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Fifth. A transfer of the deposit may be effected by delivery, as well as a deposit created in the first instance, by handing over the deeds. Therefore where A. deposited with B. two leases for 560*l.*, and afterwards assigned all his estate and effects to C. (a creditor to a large amount) for his own benefit and C. paid several creditors ten shillings in the pound, and B. in full, receiving from him the said two leases, and A. was subsequently declared bankrupt, (the assignment to C. being the act of bankruptcy) it was held, that though that assignment created no lien as to C.'s general debt, yet C. had a lien to the amount of B.'s debt, by the transfer and deposit of the leases. *Smith, Ex parte*, 1 Ves. & Bea. 518. So a mortgagee of the legal estate may transfer the benefit of his security to a third person, by delivery of the mortgage and bond, and such assignment will be binding on the assignees of a bankrupt mortgagor, who will be decreed to assign and execute the sub-mortgage contract accordingly; and notice to the mortgagor of this equitable assignment will not be requisite. *Jones v. Gibbons*, 9 Ves. 411. But the deposit of the bond alone will not create any lien, for that, if allowed, would be turning an unassignable into an assignable instrument. *Cator v. Burke*, 1 Bro. C. C. 434. The following was held a good equitable assignment of a debt, though a *chose in action*, and available in equity against the assignees in bankruptcy of the assignor: "To F. Klein, Esq. acting executor of the late John Fish: Please to pay Messrs. G. and T. Alderson, or order, 41*l.* 6*s.*, as part of the amount due to me for plumber's work done for the late John Fish, Esq. Jane Row." *Alderson, Ex parte*, 1 Madd. Rep. 53. Hence

it may be inferred, that a draft for the mortgage money by a legatee of a mortgagee on the executor, delivered to a third person, would be a good assignment in equity of the mortgage debt, though not of the pledge itself.—But if a person who has title-deeds lodged with him for a particular purpose, other than by way of lien, raises money on them by delivering them over, the mortgage will not be good, and the mortgagee will be ordered to deliver them up to the right owner, for it was his own fault that he took the deeds without inquiring into the title. *Jackson v. Butler*, 2 Atk. 306.

The equitable mortgagee having no estate in the land, cannot obtain possession of the estate over which he has a lien by means of an ejectment; nor can he, it is assumed, file a bill to foreclose, as, on failure of payment by the mortgagor, it is not fixed what estate he is to have in the premises, and nothing can be inferred to the contrary from the Lord Chancellor's observations in *Cawthorne*, *Ex parte*, 1 Glyn & Jam. 242. His remedy is by bill in equity for the establishment of his lien, and he may also pray a sale, which in several instances has been decreed, if the mortgagor neglects to pay the principal, interest, and costs, on a given day. Remedies.

Sixth. It is settled, that Lord Loughborough's general order in *bankruptcy*, (4 Bro. C. C. 548) does not apply to equitable mortgages. *Payler*, *Ex parte*, 16 Ves. 434. *Topham*, *Ex parte*, 1 Madd. Rep. 38. The consequence is, that in the instance of an equitable mortgage, a different mode of proceeding is adopted in bankruptcy than is used in other cases. The creditor applies by petition to the Court of Chancery for a sale of the premises in the first instance, and that he might be permitted to come in under the commission for the deficiency. This petition he may present without having previously proved his debt. *Jennings*, *Ex parte*, 1 Madd. 331; but the court will decide on the validity of his claim, and that decision will be conclusive on the commissioners, *S. C.* on appeal, 2 Swanst. 360. Prior to Lord Rosslyn's order, March 8th, 1794, (4 Bro. C. C. 518,) the course with legal mortgages was the same which is now observed with equitable mortgages; each person claiming as mortgagee, Of equitable mortgagee's petition for sale in bankruptcy.

Petition
in
bankruptcy.

applied in the first instance to the great seal. The necessity of an application to this quarter, arose from the nature of the transaction; for if the mortgagee went in the first instance before the commissioners, they might indeed take an account of what was due, but could make no arrangement for payment by sale of the estate. The great seal seems not originally to have entrusted the commissioners with transactions of that kind. The course was so constant, that Lord Rosslyn thought himself authorised to pronounce a general order, which, of necessity, imposed on the commissioners the duty of examining questions which had formerly been examined by the great seal. Lord Rosslyn did not include in that order equitable mortgages, *Ex parte Payter*, 16 Ves. 434; they are objects of more difficult consideration. The question, whether a writing or agreement operates as a mortgage, is not so easy as, whether a mortgage-deed is a mortgage. But, as before that order, the claim of a legal mortgagee might have been opposed, on the ground that the consideration was usurious, and the deed therefore a nullity; so, on the petition of parties claiming as equitable mortgagees, not having the benefit of that order, it may be objected, that the consideration was usurious, and the court is competent to decide that question; and seeing a clear case of vicious consideration, is bound to negative the claim, with the power, in doubtful cases, of directing an issue, or by special order, delegating the inquiry to the commissioners. Should the court erroneously decide in favor of the mortgage, the error may be rectified on re-hearing; but the jurisdiction cannot be questioned. If, in the first instance, the parties meet before the court, on the agitation and for the decision of a question involving the validity or nullity of the mortgage, the commissioners have nothing to do with that question, except by special order. When the parties come into equity, stating in answer to a petition to go before the commissioners to have an estate subject to an equitable mortgage sold, that not merely on the true construction it is not an equitable mortgage, but that the consideration is not good, and the court decides that question, the commissioners are bound by the decision. *Primâ facie* if a deed of mortgage, for a sum ascertained, is produced, the court takes that sum to be due. If, before the general order, an objection that the consider-

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ation was usurious had been made to the petition of a legal mortgagee, and the court had sustained the objection, the petition must have been dismissed; and an order on the petition of an equitable mortgagee has the same effect as an order on the petition of a legal mortgagee before the general order. If, therefore, as in the above case of *Jennings, Ex parte*, ante, 1060 a, the Vice Chancellor decides that the debt is not usurious, the commissioners cannot agitate that question; if the parties are dissatisfied with the decision, their course is to present a petition to the Lord Chancellor to displace that order. 2 Swanst. 362.

A petition, however, seems to be a wrong mode of proceeding, where there is a subsequent purchaser or mortgagee and he objects to the sale. In that case a bill is the proper remedy. *Topham, Ex parte*, ante, 1060 a. In deciding on an equitable mortgage, the validity of the debt will of course be considered, and every circumstance weighed which may be adduced to impeach it. But the validity of an equitable mortgage is never referred to the consideration of the commissioners. The court decides unequivocally on that; and having decided that, it will, if necessary, refer it to the commissioners to ascertain the amount of what is due upon such mortgage, *that* being a matter of account. If the court considers a security to be good, and directs the commissioners to take an account of what is due on such security, they cannot examine and undo its decision, but have only to consider, as a matter of figures, what is due. *Jennings, Ex parte*, 1 Madd. Rep. 336. To assist them in this, they may call the equitable mortgagee, and examine him as to the principal and interest due. 2 Christ. B. L. 323. See further, post, p. 1081 a. It is also observable, that an equitable mortgagee of property belonging to a bankrupt, who has written evidence of the mortgage, as well as a deposit of the deeds, will be allowed the costs of his petition for the sale of the premises, though the petitioner further prays that he may be at liberty to be a bidder at the sale. *Ex parte Jackman, in the Matter of King*, MS. V. C. Nov. 1823. In some cases it has been considered that the fact of non-conveyance makes the case of equitable lien much stronger, yet, on the other hand, the ex-

execution of the conveyance and delivery of possession have been argued to be a waiver of the lien. *Fowell v. Hindes*, Amb. 724. *Smith v. Hibbard*, 2 Dick. 730. In *Gyde, Ex parte*, a contract was entered into for the sale of land for 1500 guineas, with interest, till paid; by force of such contract, the purchase-money became, in equity, the property of the vendor, and the premises the property of the purchaser; there was no conveyance executed. His Honor, the Vice-Chancellor, was of opinion, that the vendor, having both the legal and the equitable title in himself, could not pray a sale as an equitable mortgagee, his remedy being by bill, and dismissed a petition to that effect, under the general order in bankruptcy, with costs; but the Lord Chancellor, on appeal, discharged this order, and made the usual decree for an account of what was due to the petitioner (the vendor), and a sale of the premises, and payment of any surplus to the assignees, on payment of any deficiency. The costs of the petition of appeal were ordered to be paid out of the bankrupt's estate to the petitioner, who had paid the costs of the original petition. *Gyde, Ex parte*, 1 Glyn & Jam. 323.

Lease not to be assigned without licence, yet deposit good against assignees.

If a deposit be made out by clear admissible evidence against the bankrupt himself, it will be binding on his assignees. 11 Ves. 403. Thus, where an equitable mortgagee by deposit applied for an order to sell the premises, and that he might prove for the residue of his debt. It was objected on the part of the assignees, that the deposit was good for nothing, inasmuch as the lease contained a covenant against assigning without licence from the lessor; and no such licence had been obtained. The Lord Chancellor however over-ruled the objection, for that the lessor might perhaps waive the forfeiture, and the petitioner had a right as against the assignees to avail himself of the advantage which he had obtained by possession of the lease. *Baglehole, Ex parte*, 1 Rose, 432. See similar determinations in *Doe v. Bevan*, 3 M. & S. 353; and *Sherman, Ex parte*, 1 Buck. B. C. 462.

Equitable mortgagee, parting with deeds, not deprived of lien, when.

Where an equitable mortgagee, by possession of title-deeds, delivered the same up to a purchaser (who was the assignee of the bankrupt mortgagor), on receipt of all the money arising

from the sale, which was not sufficient to satisfy his debt, it was held, first, that the assignee and purchaser having resold the premises at a profit of 500*l.* the same was to be carried to the bankrupt's account as part of the produce of his estate; and, secondly, that the equitable mortgagee had not, by giving up the deeds, deprived himself of his lien for the deficiency, which he was entitled to be paid in full; in preference to the other creditors. *Morgan, Ex parte*, 12 Ves. 6. That an assignee purchasing the trust-estate becomes responsible for any profit he may obtain by it; see *Lacey, Ex parte*, 6 Ves. 625; and *Grant v. Mills*, 2 Ves. & Bea. 306.

[1061]

An act of bankruptcy between the time of the original deposit, and a transfer of such deposit, will vitiate the assignment, if the mortgagor be a party and enter into a new collateral security to the transferee. Thus, where A. deposited with B. the lease of the premises in question, and afterwards applied to C. to pay off B.'s debts, which C. agreed to do, and on 20th of January, 1810, went with C. to B., whose debt C. paid, and received the lease. On the same day, A. executed a warrant of attorney, with a defeasance, reciting, that C. had lent him 1200*l.*, and that he had deposited with C. the lease of his premises as a security. A commission of bankruptcy issued against A. in August, 1810, on an act committed the 10th of January preceding. Lord Eldon said, the question was, whether B. was to be considered as the agent of the bankrupt, and C. as dealing with him for an assignment of his security. The justice of the case certainly pointed to that, but there was no doctrine to be more carefully watched than that of lien on deposits. C. had unfortunately taken a deposit from A. instead of an assignment from B. Could then the rights of C. be carried further on a deposit of deeds than on an actual mortgage? Suppose a mortgage and no person a party to it but the bankrupt, could his lender have claimed to have been in a better situation, and could he take his deposit (against the recital in the defeasance) otherwise than on a mortgage?—On these questions C.'s petition was dismissed, without prejudice however to his bringing a bill. *Combe, Ex parte*, 17 Ves. 369.

*Prior act of
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tiates transfer.*

Legal, protected by equitable mortgage.

If an equitable mortgagee procure from his borrower a legal mortgage, and before the expiration of two months become bankrupt or abscond, whereby the conveyance is rendered defeasible; yet the mortgage cannot be impeached; for "though the legal act were done in contemplation of bankruptcy, it is protected by the previous equitable title; being only effect given to a title created not in contemplation of bankruptcy, and, except in form, complete by the deposit." *Hiern v. Mill*, 18 Ves. 114.

Assignees necessary parties to conveyance.

Where A. deposited with B. the muniments of his title to leasehold premises at Brighton, as a security for a debt, and gave him power to sell the premises in case of default of payment, and B. assigned to C. for a balance of account, and A. becoming bankrupt, C. applied for liberty to sell, which was granted and effected before the Deputy Remembrancer; it was held, that the assignees in bankruptcy of the borrower were necessary parties to the conveyance to the purchaser, to embrace any equity of redemption that might be remaining in them. *Hawkins v. Ramsbottom*, 1 Price, 138. *S. C.* 4 Campb. 121.

Costs.

Lastly, an equitable mortgagee will be allowed the costs of his petition for sale, provided some agreement in writing accompanies the deposit, but not otherwise. *Trew, Ex parte*, 3 Madd. 373. *Brightens, Ex parte*, 1 Swanst. 3. *S. C.* 1 Buck. B. C. 149. The rule was formerly different, as appears by *Garbutt, Ex parte*, 2 Rose, 78. *Horne, Ex parte*, 1 Madd. Rep. 628, and *Anon.* 2 *ibid.* 281; but the above statement is supported by *Sikes, Ex parte*, 1 Buck. 349; and *Vauxhall Bridge Company, Ex parte*, Glyn & Jam. Rep. 101, in which latter case it was held, that the general rule of giving costs out of the proceeds of the sale, where there is a written document will prevail though the written instrument may require the aid of parol testimony to explain it.

In a late case it was holden, that an attorney has a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for the costs of an action

brought against the bankrupt subsequently to the issuing of the commission to recover the amount of his bill. It was contended, that the assignees were not liable for any debt incurred by the bankrupt subsequently to the issuing of the commission, and that the right of acquiring the lien as against the bankrupt ended at the time when the commission issued. But Abbott, C. J. thought the solicitor had the same right of lien against the assignees as he had against the bankrupt; and *per* Bayley, J. Suppose a mortgagor to have become a bankrupt, and the mortgagee to have brought an ejectment to recover possession of the premises, could the assignees of the bankrupt redeem without paying the costs of the ejectment. *Lambert v. Buckmaster*, 2 Barn. & Cress. 616. When a claim is attended with nicety, or involved in much doubt, the court will not decide upon petition, but will require a bill to be filed: because a difficult question ought not to be determined in a shape which will not allow either party the benefit of an appeal to the House of Lords. But costs will not be given to an equitable mortgagee who seeks by bill what might have been obtained upon petition. If an equitable mortgagee might in all cases file a bill to establish his equitable lien, bills only would be filed, and the simpler and cheaper mode of proceeding by petition would be rarely adopted. *Per* V. C. in *Suart v. Toulmin*, MS. V. C. 9th Nov. 1822, et vide ante, 1049 b.—Note, that if a broker having a lien on a policy of insurance, part with it, his lien revives on repossession. *Levy v. Barnard*, 8 Taunt. 149.

It merely remains to add, that a depositary of deeds will be responsible for gross neglect only; or, in other words, for a violation of good faith, and that for any casualty that may befall the deeds. Harg. Co. Litt. 89 a. n. (g). The notion of my Lord Coke, "that to keep, and to keep safely, are one and the same thing," (Co. Litt. 89 a.) was denied to be law by the whole court in *Coggs v. Bernard*, 2 Lord Raym. 918. If with a deposit of deeds there be no stipulation as to the degree of care, the pawnee will be answerable for ordinary neglect only; but all bailees become responsible for losses by casualty or violence, after their refusal to return the things bailed, on

Depositary must keep deeds as safely as he would his own.

a lawful demand. Jones on Bailm. 42. 120. And the rules respecting the production of deeds handed over to a legal mortgagee, (see ante, p. 633, 635) apply equally to the deposit of them by way of security or collateral security. *Schlencker v. Moxy*, 3 Barn. & Cress. 792.

[1062]

SECTION II.

Vendor's Lien for the Purchase-money unpaid.

It arises notwithstanding formal receipt, and binds party and all claiming under him with notice.

AT law, the written receipt for the purchase-money, usually indorsed on the conveyance or mortgage, is conclusive evidence of the payment of the money. *Rountree v. Jacob*, 2 Taunt. 141. *Bristow v. Eastman*, 1 Esp. N. P. C. 172. (*Strutton v. Rastall*, 1 T. R. 366, *contra*.) In equity the rule is different. If it be there shewn that the vendor received not any or a part only of a consideration, the vendee will become a trustee for the vendor for the amount of the money unpaid, and the vendor will have, by an implied contract between him and the vendee, an equitable lien on the estate for the amount of such money. *Pollexfen v. Moore*, 3 Atk. 272, and cases cited, ante, vol. i. 354, n. (P). If the purchaser become bankrupt, the vendor will be considered as a mortgagee for the purchase-money unpaid. *Chapman v. Turner*, 1 Vern. 267. Lord Eldon distinguishes the lien by deposit of deeds, and the lien by purchase-money unpaid in the following terms:—"In purchase, payment is an essential part of the contract. In loan, the contract is as complete, and the relation of debtor and creditor attaches as firmly, whether there is any security or not. A mortgage or security is merely an incidental circumstance in a transaction concluded and complete by the advance of money." *Hooper, Ex parte*, 2 Rose, 328. S. C. 1 Meriv. 9. The lien under consideration, also arises in the case where a vendee advances all or a part of the money to the vendor, and the contract is broken off; the estate in the hands of the vendor then becomes charged with so much of the purchase-money as the vendee shall have paid. *Burgess v. Wheate*, 1 W. Bl. 150. *Lacon v. Mertins*, 3 Atk. 4. And this equitable lien will bind the lands in the hands of the party himself and his heirs, as also in the hands of volunteers and *bonâ fide* purchasers with

notice, claiming under him. *Maskreth v. Symmons*, 15 Ves. 337. *Walker v. Preswick*, 2 Ves. 622. *Elliot v. Edwards*, 3 Bos. & Pul. 188. *Gibbons v. Baddall*, 2 Eq. Ca. Abr. 682.

But it will not confer priority over a subsequent mortgagee or purchaser without notice; nor over trustees for sale as it should seem; nor over a mortgagee who lends money to complete the very purchase and takes a legal mortgage at the same time. Thus, where A. sold an estate to B., who borrowed of one Pollard part of the purchase-money, and by deed, wherein they were all three parties, the estate was conveyed to Pollard in mortgage, with an equity of redemption to B.; it was holden, in the Exchequer, that A. was not entitled to be paid the sum of 800*l.* part of the purchase-money, for which he took a bond at the time from B., and his sureties, in preference to C. who, as part of the original contract, and with the consent of the vendor advanced money on the estate as a mortgagee, though he, Pollard, knew that A. was not paid the whole of his purchase-money. After the transaction above stated, a second deed was executed, to which A. and Pollard were made parties, but the deed was not executed by the latter. This deed authorized a sale, and as to the produce, directed that it should be lodged in bankers hands, to abide the result of an arbitration on some existing dispute between the parties. Lord C. B.—Pollard was made a mortgagee by the original contract between all the parties, the plaintiff A. assenting. He was as much entitled to have the security of the estate as the vendor himself, and was as much entitled to be paid his money. It is therefore quite impossible, that I can say that the plaintiff has a preference in equity, to be paid out of this purchase-money paid in by the second vendee, unless there has been any thing done by Pollard whereby he has waived his right. He certainly cannot be said to have waived his title under the deed relied on by the plaintiff as binding him, because he never executed it.—The vendor's bill for an account, and a declaration of equitable lien, were consequently dismissed with costs. *Cood v. Pollard*, 9 Price, 554.

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stances.*

This implied contract may be rebutted by clear and irresistible evidence, shewing the intention of the parties, that the estate shall not be a security for the money, 15 Ves. 341. But it is settled that a mere personal security, whether a bond, an annuity secured by bond and covenant, bill of exchange, promissory note, or the like, without more, will not of itself be sufficient to remove the equitable lien. *Hearn v. Botellers*, Carey's Rep. 25. *Hughes v. Kearney*, 1 Sch. & Lef. 36. *Grant v. Mills*, 2 Ves. & Bea. 309. *Peake, Ex parte*, 1 Madd. Rep. 346. *Gibbons v. Baddall*, and *Mackreth v. Symmons*, ante, 1062 a. And a vendor's accepting a mortgage on another person's estate, is not conclusive evidence against the existence of his lien on the estate sold. *Per Lord Manners*, 2 Ball & Bea. 515. Nevertheless, a mortgage of other lands for the whole or part of the purchase-money, (*Nairn v. Prowse*, 6 Ves. 752.) and a mortgage of the purchased estate, for part of the purchase-money, permitting the residue to remain on personal security, (*Bond v. Kent*, ante, vol. i. p. 354, text) have, under the circumstances, been held to discharge this equitable lien; wholly in the first instance, and as to the amount of the money remaining on the personal security in the second. What act short of an express agreement will remove the equitable lien in these cases has not been definitively settled. The more modern authorities on this subject have brought it to this inconvenient state; that the question is not a dry question upon the fact, whether a security was taken, but it depends upon the circumstances of each case, whether the court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken. *Mackreth v. Symmons*, ubi sup. Perhaps the best general rule is that suggested by the Master of the Rolls, in *Nairn v. Prowse*, viz. that if by allowing an equitable lien, the party will have a double security, *there* the circumstances afford evidence of an intention that the money on the personal security should not form a lien on the estate.

Purchase-money not to be paid till vendor's death, for which a bond is

In a recent instance the contract for sale and purchase expressed that the price of the estate should not be paid till the death of the vendor, the vendee agreeing to pay interest

upon it by half-yearly payments until that period, and to give his bond accordingly. But the language of the conveyance did not proceed upon this agreement. It was expressed to be made in consideration of a sum of money then paid, the receipt for which was indorsed upon the deed. The terms of the written agreement, however, did in fact govern the conduct of the parties, and a bond was taken for the payment of the purchase-money at the death of the vendor, and for payment of interest in the mean time. The question was, whether, under these circumstances, the vendor had a lien upon the estate for the money mentioned in the condition of the bond. The Vice Chancellor:—In ordinary cases where the conveyance expresses, contrary to the fact, that the purchase-money is paid, there, though the estate passes at law by the conveyance, it does not pass in equity until the actual payment of the price; until the vendor has received that consideration, for which it appears by the deed he contracted to part with the estate. Suppose it had been expressed in the conveyance, that the price was not to be paid until the death of the vendor, and there had been a covenant on the part of the purchaser then to pay the amount, and to pay the interest in the mean time; could it then have been said that it appeared by this deed that the vendor had contracted not to part with his estate until actual payment of the price? Would it not rather have been the true effect of the language of the conveyance in such case, that the vendor had contracted to part with his estate presently, not in consideration of the actual immediate payment of the price, but in consideration of the covenant for the future payment of that sum with interim interest; and, that having therefore the covenant, which was the consideration bargained for, the said estate must pass by the conveyance in equity as well as at law. Now, although it is not expressed in this conveyance, that the price was not to be paid till the death of the vendor, yet, such was in fact, the actual agreement, and substantial dealing of the parties, and the language of the conveyance to the contrary is the mere result of the common form; and the question comes to this, whether the court is concluded by the form of the deed from entering into the truth of the case. If the language of the deed is to prevail in this case, then the price is to be taken *given, lien discharged.*

as actually paid; for so it is expressed in the deed. It is the vendor, therefore, who in the first place attempts to raise an equity against the allegation of the deed; and if the vendor be permitted to repel the effect of the deed, by showing that the price was not paid, it must necessarily follow that the vendee must be at liberty to disclose the whole truth, and to explain the reason why that payment was not made. I consider, therefore, that the case is, in principle, the same as if the conveyance had stated the real contract of the parties; and that by the effect of that contract the vendor agreed to part with his estate immediately in consideration of the bond for the future payment of the price; and that, when such bond was executed, the estate passed to the vendee in equity as well as at law.—The bill was accordingly dismissed. *Winter v. Anson*, 1 Sim. & Stu. 434. (In this case the leading authorities on the subject are cited.) So a covenant between vendor and purchaser, that the purchase-money should be repaid within two years after resale, discharges the vendor's lien. *Parkes, Ex parte*, 1 Glyn & Jam. 228. But where an estate was sold but the contract ultimately rescinded in consequence of a defect of title to a small but material portion of the estate, the vendors were ordered to repay the purchase-money with all costs and expences incident to the purchase and conveyance. *Edwards v. M'Leay*, 2 Swanst. 287.

Vendor's lien affected by his retention of title-deeds.

A vendor who has a general lien on an estate, has a general lien as against the purchaser only, and those who claim under that purchaser with notice; but it does not follow that a vendor's lien is to be excluded, because he has by agreement retained the title-deeds. An agreement that he shall retain the title-deeds in his possession may have for its object, not to exclude, but to secure his lien; for by possession of the title-deeds, he prevents any stranger from acquiring an interest in the estate without notice of his, the vendor's, lien. *Per V. C. in Wreford v. Lethern*, MS. April, 1824.

Priority of vendor's lien and equitable mortgage, decided by rule qui priori, &c.

In *Mackreth v. Symmons*, 15 Ves. 337, the plaintiff had a lien as vendor, the defendant was a subsequent mortgagee, to whom an actual conveyance had been made by the assignees of the vendee; the defendant foreclosed, but without making the

plaintiff a party to his bill. It proved, that the legal estate was outstanding in a third person, so that all the incumbrances were *equitable*. Lord Eldon, after noticing that fact, observed, that between equities, the rule, *Qui prior, &c.* applied, and gave judgment for the plaintiff.

If the vendee die, leaving a personal estate insufficient to pay all his debts and legacies, the better opinion seems to be, that a court of equity will arrange the assets so as to confine the vendor to his equitable lien, or permit others to stand in his place, according to the rule, ante, p. 890, n. (S). But Mr. Sugden thinks the contrary in his *Vend. & Pur.* p. 467, 5th edition. *Marshalling assets.*

SECTION III.

[1063]

Of Solicitor's Lien, and Mortgages between Attorney and Client.

THIS section naturally divides itself into two parts, the *first*, as to solicitor's lien, and the *second*, as to mortgages taken by an attorney from his client.

First. An attorney has a lien for his general balance on all the papers of his client which comes to his hands in the course of his professional employment. Where therefore C. gave his attorney a specific sum for the purpose of satisfying a debt, for which an execution had issued against his goods, at the suit of B. and the attorney paid the money to B. who, thereupon, delivered to him a lease which had been deposited by C. with B. as a security for the debt, it was held, that the attorney had a lien on it for his general balance due from C.; and that such lien was not extinguished by his having taken acceptances from C. for the amount of that balance before the lease came to his hands. *Stevenson v. Blakelock*, 1 M. & S. 535. So, though papers do not come into the hands of an attorney or solicitor in the particular cause in which he makes the demand of costs, he will have a lien. This, it is said, depends on practice; which is, that the attorney should have the lien; and that being once established, he trusts to it, and on the faith of it makes larger advances for his client in other causes. *Nesbit*, *Extent of solicitor's lien on papers and money received.*

Ex parte, 2 Sch. & Lef. 279. A solicitor has a lien on costs ordered to be paid to his client upon a petition in bankruptcy, although there be no fund in court; nor can the client release the benefit of the order to the prejudice of the solicitor. *Bryant*, *Ex parte*, 2 Rose, 237. In like manner, an attorney has a lien on quarterly payments of an annuity coming into his hands. *Skinner v. Sweet*, 3 Madd. 244. And it seems the attorney may obtain an order to prevent his client from receiving money recovered in a suit, in which he has been employed for him, until his bill be paid. *Wilkins v. Carmichael*, Doug. 104. 4th edit. et vide *Rex v. Burg*, ib. 194, n. (26). But, whether a solicitor's lien for his costs on a fund in court is general, or is confined to the costs of the particular suit, was made a question in *Worrall v. Johnson*, 2 Jac. & Walk. 214. An attorney having a lien on the papers of A. & B. jointly, the court will not, if the lien be discharged, try the rights of the parties, by saying which shall be given up, or to whom. *Duncan v. Richmond*, 7 Taunt. 291. S. C. 1 J. B. Moore, 99. Nor will the Court of Common Pleas order an attorney to deliver up papers in his hands, before his bill is taxed, on the payment of money on account. *Dyer v. Bowley*, MS. Common Pleas, January 27th, 1824.

If an attorney accepts a security for the money due to him he abandons his lien, and cannot afterwards set it up to ward off a requisition to produce the deeds in his possession. *Cowell v. Simpson*, 16 Ves. 274. The doctrine laid down in this case was doubted by the Court of King's Bench in *Stevenson v. Blakelock*, 1 Maul. & Selw. 535; but in a subsequent case of *Chase v. Westmore*, 5 Maul. & Selw. 180, it was acquiesced in. And the same eminent judge who decided that case has, in a recent instance, reiterated his opinion. *Balch v. Symes*, 1 Turn. 92.

Same.

A question was made in *George v. George*, whether an attorney's lien extends to the original will of his client. Without deciding the question, the will was ordered to be produced before the examiner for the hearing of the cause, so as not to prejudice the solicitor's lien if he had any, 18 Ves. 294. In a later case, the Lord Chancellor distinctly held, that a solicitor

can have no lien on a will, which is of so unsettled a nature, that it may be altered even in *articulo mortis*, and the same observation may be made with respect to a voluntary settlement which contains a power of revocation. *Balch v. Symes*, 1 Turn. 92. If a tenant for life gives deeds into an attorney's hands, the attorney will not have any lien on them for his costs against the remainder-man, for that would be to enable a tenant for life to charge the estate in remainder. *Nesbit, Ex parte*, 2 Sch. & Lef. 279. But where a mortgagee having possession of the mortgagor's title-deeds lodged them with an attorney, it was held, that the attorney had a lien on them for business done to the mortgagee. *Schoole v. Sall*, 1 ib. 176. So where deeds were deposited with a solicitor for a particular purpose, and after that had failed they were permitted to remain with him, it was held that they were subject to his general lien. *Pemberton, Ex parte*, 18 Ves. 282; and in *Sirling, Ex parte*, 16 Ves. 258, it was held generally, that an attorney's lien on papers in his possession is not limited to the occasion on which they were delivered, without special agreement; et vide *Steele, Ex parte*, 16 Ves. 164.

A person purchased an estate, and directed his solicitor to prepare the conveyance, which he did, and sent them to the vendor for execution. The vendor executed the deeds, and gave them to his servant to take back. The servant carried the deeds to Oxenham, the vendor's attorney, who had a considerable bill on the vendor for business done in other transactions. Some necessary parties refused to execute the deeds, and the purchaser having abandoned the contract, demanded the deeds from Oxenham, who refused to deliver them up, claiming to have a lien on them for his demand against B. the vendor. In trover for deeds and stamped pieces of parchment, it was held, that the purchaser was entitled to recover the deeds at all events, in a cancelled if not in an uncanceled state. *Esdaille v. Oxenham*, 3 Barn. & Cress. 225. The deed not having been perfected by delivery to the purchaser, and the purchaser not having been paid, as also the parties not having executed the deed, it is probable the estate would be held as not vesting in the purchaser, and consequently that no reconveyance was requisite, as in *Boltan v. Carlisle*, 2 H. Black. 259,

Attorney no lien where deeds accidentally fall into his hands.

and cases of that class. A solicitor is entitled to his whole costs, and therefore an order which directs a solicitor to deliver up papers, &c. upon payment of the costs due to him in a particular cause, when other costs are also due to him, is irregular and will be set aside. *Dew v. Clarke*, MS. Vice Chancellor, 1823, February 27th. But in a more recent case the Lord Chancellor decided, that although the general lien must prevail where deeds are delivered for the purpose of conducting a suit, yet where they are delivered for a *specific* purpose beyond that purpose, there can be no lien. *Balch v. Symes*, 1 Turn. 92. So where a person obtained possession of deeds in the character of steward, it was held, he could have no lien upon them for what was due to him in any other character. *Champernoon v. Scott*, 6 Madd. 93. If a solicitor withdraws from the conduct of a suit, he cannot claim to retain the papers necessary for the prosecution of it till his costs are paid, but will be ordered to deliver them up, without prejudice to his lien, to the new solicitor of the party. *Colgrave v. ———*, MS. Lord Chancellor, November, 1823. An attorney is not bound to deliver up deeds and papers to the assignees of a bankrupt until his lien upon them is satisfied. *Lambert v. Buckmaster*, MS. K. B. 1824, February 9.

Agent's lien.

Where the town agents of a country solicitor (since a bankrupt) had received papers from him belonging to his client, for the purposes of the client's business, they were held to have a lien on them as against the client, for the amount of money due from him to the solicitor, and from the solicitor to them, on account of business done in the cause. And where the client had, after the solicitor's bankruptcy, paid the agent money to obtain such papers, although an action had been previously brought against him by the assignees for the recovery of it, the court of Exchequer granted and continued an injunction against the action, on the ground of the agent's lien. *Bray v. Hine*, 6 Price, 203. *White v. Royal Exchange Assurance Company*, 1 Bing. 20.

*Conveyancer's
and special
pleader's lien.*

The lien treated of in this section has also been extended to the certificated conveyancer and special pleader on papers in their hands, for the costs in preparing them, or others in the

same business. *Hollis v. Claridge*, 4 Taunt. 807. As to the conveyancer's remedy for his fees, see the late case of *Poucher v. Norman*, MS. February, 1825; over-ruling the decision of Best, J. in *Jenkins v. Slade*, *ibid.* Easter, 1824.

Where a solicitor who has papers in his hands relating to a *Bankruptcy*. bankrupt's estate, upon which he claims a lien for his bill of costs, comes in under the commission, and proves his debt, [1064] such proof is equivalent to payment, and he must deliver up the papers to the assignees. *Hornby, Ex parte*, 1 Buck. B. C. 354. In a late case, the bankrupt deposited with A. the title-deeds of premises which he had previously mortgaged to R. and Co. After the bankruptcy, it was agreed between R. and Co., A., and the assignees, that the assignees should sell the premises and apply the proceeds in payment of R. and Co. and A. Upon a petition by the solicitor of the bankrupt, claiming a lien by deposit of the title-deeds of the premises prior to A., it was held, that there was no jurisdiction in bankruptcy to determine the priority of lien between A. and the petitioner; and that A. was not precluded from objecting to the jurisdiction, by filing affidavits as to the merits. *Allison, Ex parte*, 1 Glyn. & Jam. 210.

A solicitor's lien extends only to the custody of the deeds, he cannot refuse to produce them as evidence in a cause. It would indeed be very extraordinary if a deed by which property is conveyed, were to be of no effect, because the party who executed the deed did not choose to pay his solicitor's bill. It might indeed be reasonable to refuse the party for whom the deed is prepared, access to it until his solicitor's claim be satisfied, but to refuse to produce it as witness to any other party could not be justified. *Bassington v. Bassington*, 1 Sim. & Stu. 455. The only proper mode of compelling an attorney to produce a deed in his possession is by a *subpoena duces tecum*, *Bush v. Lewis*, 6 Madd. 29; and note, an attorney's bill after it has been paid is not liable to taxation, unless it can be impeached on the ground of gross over-charge, fraud, or mistake, and this rule is conclusive, even where it has been paid by trustees acting under a deed of trust for sale, and

the taxation is applied for on behalf of the *cestui que trust* interested in the surplus arising from the sale. *Wilkinson, demandant v. Foster*, vouchee, MS. Common Pleas, 1823, January 31st; et vide 1 Tidd's Prac. 7th edit, 100.

Effect of attorney's discharge, discontinuance to act, and death.

At law the party cannot change his attorney without a Judge's order, and then the court provides, that the papers shall not be taken out of his hands without doing that justice which his lien gives him. But in equity a party may discharge his solicitor, and though he has a lien for his costs upon papers in his possession, yet he cannot (except by retaining them) prevent the progress of the cause until he is paid. *Twort v. Dayrell*, 13 Ves. 195; *O'Dea v. O'Dea*, 1 Sch. & Lef. 315; nor can he prevent his client discontinuing the action, subject to the costs incurred. *Merryweather v. Melksh*, 13 Ves. 162. Until the attorney's lien has been discharged the owner of the deeds will be entitled to inspect them. *Hornby, Ex parte*, 1 Buck. 354. This case seems an authority for a general inspection; but in *Ross v. Laughton*, 1 Ves. & Bea. 349, it was held, that though a discarded solicitor was bound to produce the papers of his client for him, or in case of his bankruptcy, for his assignees in the cause for the purposes for which he received them, yet he was not bound without payment to deliver them up, or produce them *in any other business*. In a later case however it was decided, that a solicitor *refusing* to proceed further in a cause, must allow the new solicitor to see the papers detained in his possession, until his bill be settled, at all reasonable times, and must himself attend with them before the Master, or suffer the new solicitor to have them for that purpose: and that he could not by virtue of his lien prevent the king's subject from obtaining justice. *Commerell v. Poynton*, 1 Swanst. 1: et vide *Cresswell v. Byron*, 14 Ves. 271, where it was held, that a solicitor having declined to act for his client, has no lien for his costs on a fund in court, and that an attorney quitting his client cannot bring an action for his bill. In *Uxbridge, Ex parte*, an order was granted (without a cause in court depending) upon the general jurisdiction over a solicitor, that he should deliver his bill for the purpose of obtaining from him title-deeds deposited with him for suffering recoveries. 6 Ves. 425. Where a plaintiff had, by a new attorney

entered satisfaction on the record of a judgment, it was held that the *defendant* was entitled to be discharged, although the costs of the plaintiff's attorney had not been satisfied. An attorney has no lien on the person of the defendant. *Marr v. Smith*, 4 Barn. & Ald. 466; et vide *Martin v. Francis*, 2 ib. 402. The court will not order the representatives of a deceased solicitor to deliver the papers in a cause to another solicitor, unless the client will pay what is due to the representatives. But it seems the court will interfere against a solicitor's representatives in the same manner as against the solicitor himself. *Redfern v. Sowerby*, 1 J. Wils. 96. *S. C.* 1 Swanst. 84. *Fenwick v. Reed*, ante, vol. i. 327, note (G).

Representatives.

Second. An attorney may contract with his client, provided no advantage be taken of the confidential relation between them. *Cane v. Allen*, 2 Dow, 289. Therefore, where a solicitor advanced money to his client to carry on his suit and to maintain him in the interim, and took a mortgage for securing the payment of the costs and money advanced, Lord Eldon did not say the security was void, but merely that it was of a nature which courts of justice viewed with great jealousy. If securities for past and *future* costs were regardlessly allowed, there certainly would be a wide opening for careless inattention in the expences. But a mortgage from a client to his attorney will not prevent the client from having the attorney's bill taxed. *Newman v. Payne*, 4 Bro. C. C. 350. In *Langstaffe v. Fenwicke*, the mortgagee was the attorney of the mortgagor, and the conduct of the attorney was considered not altogether free from blame in other circumstances, yet no objection was taken to the mortgagee on account of the relation of attorney and client. 10 Ves. 405. *S. C.* ante, vol. i. 297, n. In *Pain v. Hall*, 18 Ves. 475, Mr. J. Buller seemed to consider the very circumstance of a solicitor's framing a deed or will in his own favor, as almost decisive evidence of fraud, but that doctrine is not now followed. The nature of the transaction depends upon the circumstances of the case, and clearly admits of explanation. *Balch v. Symes*, 1 Turn. 92. The general rule is, that an attorney cannot take from his client a mortgage *ab. ante*, for the amount of his future bill for business to be done. But for disbursements and money to be advanced he

Attorney may take mortgage from client, though for costs, but he will be narrowly watched, and must produce vouchers.

may. *Pitcher v. Rigby*, 9 Price, 79. It is also observable, that beneficial contracts and conveyances obtained by an attorney from his client during their relation as such, and connected with the subject of the suit, have been decreed to stand as a security for what was actually due. *Wood v. Downes*, 18 Ves. 120. But though contracts between attorney and client are supported, yet the court will anxiously scrutinize all dealings between them, and protect the client from his own acts done under the influence or ascendancy which the attorney in that character may have acquired over him. *Bellew v. Russell*, 1 Ball & Bea. 105. In mortgage transactions this rule is rigidly enforced. Thus, where an attorney and agent advanced money to his client and principal in various sums, and at different periods, from 1773 to 1778, taking securities and getting accounts settled, and the transactions were not impeached till 1783, the House of Lords (confirming a decree of the court below) ordered the settled accounts to be opened, and the whole transaction sifted; and that the securities should not be admitted as evidence of the demands, but that the attorney should only be allowed in account the money actually advanced and proved to be so by other evidence than by the securities and settlement of accounts. But, as in the case of accounts in some sense settled, and a considerable period elapsing before they were impeached, vouchers might have been delivered up or lost, the oath of the party was to be admitted as evidence of the existence and import of such vouchers. *Morgan v. Lewis*, 4 Dow, 29. In the court below, it was in this case also held, that where an attorney procures money on mortgage for his client from other clients, and gives up to the client mortgagor a bond, obtained from that client in respect of separate transactions between themselves, as part consideration of the mortgage, a separate account shall be taken of the mortgage transaction, and that the account shall be confined to the money actually advanced by the clients, the mortgagees, and the mortgage security cut down as to the other alleged parts of the consideration; and further, that the attorney shall not be allowed to take timber felled on the mortgaged estates in execution for his private debt, for that the timber is part of the security of the mortgagees, and the produce goes in discharge of the mortgage account. *Lewis v. Morgan*, 3 Anstr. 769. 5 Price, 42. 4 Dow, 29.

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In *Piddock v. Brown*, 3 P. Wms. 288, Lord Talbot laid down this rule, that upon producing a bond or mortgage it is *prima facie* good evidence of a debt; but wherever there are manifest signs of fraud in the obligee, &c. in such case he ought to be put to proof of actual payment; and though he may happen thereby to lose some part of the money really due to him for want of being able to make sufficient proof, it is but a just punishment for the fraud, of which he appears to be guilty, and will be a proper discouragement to others from committing the like. This was relied on by Lord Thurlow, in *Vaughan v. Lloyd*, 5 Ves. 48, cited. But the great rule, said Lord Eldon, in a subsequent case, was, that he who bargains in matter of advantage with a person placing confidence in him, is bound to shew that a reasonable use has been made of that confidence; a rule, applying to trustees, attorneys, or any one else. *Gibson v. Jeyes*, 6 Ves. 278. And a Court of Equity will at all times order an attorney's bill to be taxed, though he has a bond, or mortgage, or judgment, for the amount, and even after payment of it. *Walmsley v. Booth*, 2 Atk. 29. *Drapers' Company v. Davis*, *ibid.* 295. *Newman v. Payne*, 4 Bro. C. C. 350. 2 Ves. jun. 199. But it is not a matter of course, for after long acquiescence, and a security given, the Court will not interfere, unless upon a special case of fraud, or grossly improper charges. *Longstaffe v. Taylor*, 14 Ves. 262. *Cooke v. Settree*, 1 Ves. & Bea. 126. *Plenderleath v. Fraser*, 3 Ves. & Bea. 174. In *Piggott v. Williams*, a solicitor filed his bill for foreclosure of an estate pledged as a security for costs. The client filed a cross bill alleging the costs demanded to have been occasioned by negligence and want of skill; a demurrer to this bill was over-ruled, on the ground of equitable set-off. 6 Madd. 95. The same principle is extended to a steward and his employer. There is no rule of policy which prevents a steward from being a lessee under his employer. There is no rule of policy which prevents a steward from receiving from the bounty of his employer a beneficial lease. But where the transaction proceeds not upon motives of bounty, but upon contract, there the steward is bound to make out that he gives the full consideration which it would have been his duty, as steward, to obtain from a stranger; and, where the transaction is mixed with

Attorney put to
proof of pay-
ment of money
lent.

motives of bounty, there the steward is bound to make out that the employer was fully informed of every circumstance respecting the property which either was within the knowledge of the steward, or ought to have been within his knowledge, which could tend to demonstrate the value of the property, and the precise measure and extent of the bounty of the employer. *Salvey v. Rhodes*, 2 Sim. & Stu. 49.

Commission.

Where in mortgage accounts the mortgagee had charged commission for receiving the produce of a West India plantation mortgaged, when in fact he resided in England, Lord Rosslyn said, the act of the assembly of Jamaica would be waste paper, if the defendant could succeed, merely by calling himself not a mortgagee but an attorney, to entitle himself to all these charges for commission; it was unconscionable, and not allowable. *Chambers v. Goldwin*, 5 Ves. 838.

Attorney negligently lending client's money on defective security, responsible.

In a Scotch cause, the principle of which may be easily transferred to the courts in England, a law agent employed in his client's business, lent his money on a security, which eventually failed, through the negligence of the agent. It was held in the English House of Lords, that the agent was personally responsible for the loss, notwithstanding a lapse of twenty-five years acquiescence, and a settlement of his account, and a discharge by the client's representative, he continuing to act for his client, and it appearing that he had concealed from him the real state of the transaction, and had not communicated the insolvent situation of the parties with whom he had dealt on his client's behalf. *McDonald v. McDonald*, 1 Bligh, 315.

Attorney holds deeds as well for mortgagor as mortgagee.

Where an attorney, having a deed of settlement in his possession for a particular purpose, delivered it over to a mortgagee, after having said in his answer that he was ready to produce it as the court should direct, he was held not guilty of a breach of trust; since he was equally a trustee for the mortgagee as for the mortgagor, who was only tenant in special tail, and no fine had been levied, or recovery suffered. A bill of discovery brought by the heir in tail was therefore dismissed. *Siddons v. Charnells*, Bunb. 298.

As to the client's bounty to his attorney, it was laid down, *Client's gift to attorney.* in *Wright v. Proud*, that, independent of fraud, an attorney shall not take a gift from his client while the relation subsists. 13 Ves. 138; et vide S. L. *Hatch v. Hatch*, 9 ibid. 296; and generally, *Aubrey v. Popkin*, 1 Dick. 403. *Bellew v. Russell*, 1 Ball & Bea. 104. ante, vol. i. 124, in *notis.* *Wood v. Downes*, 8 Ves. 120, and *Montesquieu v. Sandys*, ib. 302.

SECTION IV.

[1066]

Of Mortgages of Public Stock.

(Ante, 895.)

PUBLIC stocks or funds are perpetual annuities, subject to redemption. They are a mere right; and the circumstance that government is the debtor makes no difference. They constitute a simple right to demand dividends as they become due, having no resemblance to a chattel moveable or coined money capable of possession and manual apprehension. *Wildman v. Wildman*, 9 Ves. 174. A very untechnical expression is commonly used with regard to stock, for literally there is no such thing as "one hundred pounds stock;" nevertheless, as in common parlance, people, speaking of stock, will so express themselves, the court will apply it. *Kirby v. Potter*, 4 Ves. 751. The lawfulness of a loan of stock was established, by *Sanders v. Kentish*, 8 T. R. 162. *Mortgages of stock.*

A conditional transfer of stock, by way of loan, is viewed in equity as an absolute sale, on account of the risk to which such transactions are subject. Thus, in *Dennison, Ex parte*, 3 Ves. 552, a sum of 5000*l.* 3 per cent. reduced annuities, was transferred as a security for a floating balance, and under an agreement to continue it, transferred and re-transferred by the creditor by way of loan: but it was held to be a sale; 3 Ves. 553, et vide ante, p. 962, as to the means whereby a mortgagee of stock may obtain payment of his money. The decision in *Dennison, Ex parte*, may be evaded by a transfer of the stock to trustees on special trusts, and such, it is conceived, is the proper mode of mortgaging an immediate interest in this species of property. *Loan of stock viewed as sale.*

Mortgages selling must account for surplus.

If a mortgagee of stock takes advantage of the decisions in *Dennison, Ex parte*, and *Lockwood v. Ewer*, ante, 963, text, he will be decreed to account for the surplus produced by the sale, after deducting his principal, interest, and costs. *Harrison v. Hart*, Com. 393. This case affords a striking illustration of the extent of the South Sea bubble. It appears that 20,000*l.* South Sea stock was transferred as a security for 70,000*l.* money and interest, and that the 20,000*l.* stock actually produced the sum of 86,291*l.* 17*s.* 8*d.* sterling. By the deposition of one witness, the defendant agreed to sell him 1000*l.* South Sea stock at 1000 per cent. premium.—That the mortgagee selling stock, must account for the surplus after payment of the debt and costs, appears further established by the following case of *Thomas v. Puddlesbury*, Sel. Ch. Ca. 51; though certainly there arises an obvious inconsistency in saying that every mortgage of stock is an absolute sale, and then adding that the mortgagee is accountable as on a redemption. On this however it must be recollected that *Dennison, Ex parte*, is the latest and ruling decision. In the case alluded to, A. was possessed of long Exchequer annuities for 99 years, which were settled on the husband for life, with remainder to the wife for life, with remainder for younger children's portions, and the husband obtained liberty, by decree of the court of Chancery, to borrow 300*l.* upon the security of these annuities, which was done, and the security placed in B.'s, the lender's hands. B. subscribed the annuities into the South Sea stock, in 1720. A. brought his bill for reconveyance; and it was held, that B. had his security for a particular purpose only, and had no authority to subscribe; so he was decreed to account for the profits, and to convey, on payment of principal, interest, and costs. Sel. Ca. Ch. 51.

Damages calculated at price of stock on day it should be replaced, not on day of trial.

On the subject of stock the following cases remain to be noticed. In *Forrest v. Elwes*, 4 Ves. 492, the defendant sold out 8000*l.* old South Sea annuities, and took a bond from Forrest to replace the stock at the end of six months, and for payment of legal interest on 7170*l.* (the produce of the sale) in the mean time. F. made default in replacing the stock; and the matter coming on in Chancery, when the value of the stock was very much depreciated, the Master of the Rolls allowed

the claimants under *Elwes* to recover the money for which the stock was sold, with interest in the mean time at 5% per cent. This case may be considered as decided on the particular circumstances of hardship attendant on the great depreciation of the value of the pledge, and cannot be advanced as an authority for a general rule, that under a similar proviso, the court of Chancery will decree a redemption on payment of the money instead of a transfer of the stock, in order to save the lender from a loss. In the same case, his Honor observed, that if an action had been brought recently upon the breach of the agreement, and the stock had risen, the jury would, by way of damages, have given the rise, and would not have confined it. Accordingly, in a subsequent case upon a writ of inquiry to assess damages on a bond, the only question was, whether the damages should be calculated at the price of the stock on the day when it was to be replaced, or at the price of the stock on the day of the trial, the value of the stock having risen in the mean time? It was decided, that the plaintiff was entitled to recover the larger sum, being that which could alone indemnify him at the time the action was brought. *Shepherd v. Johnson*, 2 East, 211. So in *M'Arthur v. Seaforth*, 2 Taunt. 257, it was held, that on a failure to replace stock, the measure of damages is the price at the day when it ought to have been replaced, or the price at the day of the trial, *at the option of the plaintiff*, but not as it should seem at the highest price on any intermediate day. In this case, the plaintiff gave a bond, conditioned to replace 5 per cent. stock on a given day; after that day, government gave the holders of stock agreed to be replaced, an option to be paid off at par, or to commute their stock for 3 per cents. The plaintiff expressed to the defendant a wish to have the stock replaced, that he might be paid at par, but no wish to take 3 per cent. stock. On which it was held, that he was not entitled to recover the price of so much 3 per cent. stock as he might have obtained in exchange for the 5 per cents. Hence it is in the power of the lender, after a default once made, to take advantage, by hastening or delaying his suit, of the rise in the market, without any risk in case the market falls. This inequality was in one case urged against assessing the damages at the value of the stock at the time of the action brought; but Grose, J. observed, that it was no

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answer to say that the defendant might be prejudiced by the plaintiff's delaying to bring his action; for it was his own fault that he did not perform his engagement at the time; or he might replace it at any time afterwards, so as to avail himself of a rising market. *Shepherd v. Johnson*, 2 East, 212. The fair rule is said to be, to take the price of the stock on the day of trial, or the day previous. *Harrison v. Harrison*, 1 Carr. 412.

Effect of borrower's bankruptcy.

If a mortgage be made upon a loan of stock, to secure a re-transfer, and the mortgagor becomes bankrupt, the mortgagee will be entitled to prove for such dividends as became due before the bankruptcy, and for the stock according to its value at the date of the commission. *Day, Ex parte*, 7 Ves. 301. And where stock was secured by bond and the collateral security of real estate to be replaced at the end of three years, and in the mean time the dividends to be paid as they accrued due, and the dividends were not regularly paid, and before the expiration of the three years the obligor became bankrupt, it was held that the obligee was entitled to have the proceeds of the sale of the real estate immediately laid out in the purchase of stock, without waiting the expiration of the three years. *Fisher, Ex parte*, 1 Buck. B. C. 188. S. C. 3 Madd. 159.

Loan connected with stock-jobbing, illegal.

A loan made for the purpose of enabling a party to pay or compound differences upon illegal stock-jobbing transactions, is in itself illegal; and all securities given for re-payment of the money are void, even though the lender were no party to the transaction. And where one of two partners had sustained losses by stock-jobbing speculations, and his other partner had joined with him in a bond to secure a loan made by a third person for the purpose of meeting such losses, it was held, that it not being a debt to which the partnership was liable, the loan being illegal, and the security void, it was not competent for one partner, after an act of bankruptcy by the other, to dispose of the partnership property in discharging such a security, and the assignees were entitled to recover back money so had and received. *Cannan v. Bryce*, 3 Barn. & Ald. 179. And see *Aubert v. Mase*, 2 Bos. & Pul. 371, over-ruling the distinction taken between *malum prohibitum* and *malum in se*, in.

the cases of *Faikney v. Reynous*, 4 Burr. 2069; and *Petrie v. Hannay*, 3 T. R. 418. S. C. 6 ibid. 407, cited; et vide *Langton v. Hughes*, 1 M. & S. 594.

Where a person obtained an equitable interest in a sum of money on mortgage by virtue of covenants in a marriage settlement, and such money was afterwards converted into exchequer bills, and finally invested with other monies in the funds; it was held, that the *cestui que trust* was entitled to so much of the stock as was proved to have been purchased with the mortgage money, and was not to be postponed to a subsequent assignee of the whole stock, merely because he acted as the attorney of his trustee in the transfer and investments. *Liebman v. Harcourt*, 2 Meriv. 513.

Stock liable to same trusts as purchase-money.

An agent or attorney, having power to sell, assign, and transfer stock in the public funds, cannot transfer it under the power by way of mortgage. If he does, the mortgagee, having notice of the power, will be decreed to re-transfer it, to repay the dividends he may have received, and to pay the costs of suit. But it would be otherwise if the mortgagee had no notice of the power, and this, it seems, it would be very easy for the agent or attorney to prevent, by first selling the stock into another name, and then buying it back in his own. *Debouchout v. Goldsmid*, 5 Ves. 211.

Power of attorney.

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In addition to the observations made ante, 895, in *notis*, as to usury connected with loans of stock, it may be here further remarked, that where the exact value of the stock to be sold or replaced has been previously estimated by the parties, so that all is certain and nothing contingent, the transaction will be usurious if more than 5 per cent. be taken. Thus in ejectment to recover possession of mortgaged premises, it appeared that the mortgage was made upon a selling of stock. The mortgagor had applied for money to the mortgagee, who told him that all his money was in the funds, and that to sell out stock at that time would be a considerable loss to him, stock then standing at 73; but that if he would take it at 75, he should have the sum he wanted. The mortgagor consented to

Loans connected with certain stock, not contingent, transaction usurious if more than 5 per cent. taken.

this, and received 1500*l.* in stock valued at 75; this he sold the same day, when the current price of stock was 72½ by which he lost between 50 and 60*l.* Upon proof of these facts, Lord Kenyon held the transaction usurious, and nonsuited the plaintiff. *Doe v. Barnard*, 1 Esp. N. P. C. 11. So in *Boldero v. Jackson*, 11 East, 612, the plaintiff had made advances to the defendants, and credited them with 25,000*l.* at a time when the 3 per cents. were at 50; in consideration of which, in October following, when the 3 per cents. were at 51½, he undertook to purchase the sum of 50,000*l.* in their names, and to account for the dividends thereon from Midsummer-day then last,—it was allowed on all hands that this was usury.

So, it seems, that what are called continuation contracts are usurious. *Smedley v. Roberts*, 2 Campb. 607, et vide Comyn, on Usury, ch. ii. sec. 9. That dividends on stock are not apportionable, like the interest on a mortgage, see *Rashleigh v. Master*, 3 Bro. C. C. 100. *The King v. Churchwardens of St. John*, 6 East, 184, et ante, 943, text.

Since the publication of the last edition of this work the two following cases have occurred:—

Mortgage of stock, giving the LENDER the option of claiming a certain sum of money, or a certain amount of stock for repayment, usurious—and of an under-mortgage of stock.

Johnson v. Williamshurst.—Johnson, being entitled to one-fourth of a sum of stock, assigned all his right and interest in it to Williamshurst; but it was at the same time agreed and understood between them, that Johnson should be at liberty to redeem the stock, thus assigned absolutely in appearance, but, in reality, only mortgaged, on the payment of a specified sum, with interest. Williamshurst subsequently assigned all his interest in this stock to Finch. Finch, being thus entitled apparently to the absolute property of the stock, mortgaged it to S. for 900*l.*: and it was a stipulation in the deed of mortgage, that S. should have the option, either of having the 900*l.* paid to him, or of having a certain amount of stock replaced. Finch afterwards became bankrupt. The bill was filed by Johnson for the redemption of the stock, according to his original contract with Williamshurst. There was a letter written by Williamshurst, for himself and Finch, in which

they admitted Williamshurst's agreement, that Johnson should be entitled to redeem on the payment of a certain sum, with interest.

The VICE CHANCELLOR.—The bill seeks that redemption, which was, in truth, the contract of the parties. The letter written by Williamshurst, for himself and Finch, admits and proves the agreement for redemption alleged in the bill. Against Williamshurst and Finch's assignees, therefore, Johnson has a clear right. He must have the same right against S.; for S. cannot claim any rights under the mortgage made to him by Finch. A contract of loan, which gives the LENDER the option; either of being repaid in money, or of having a certain amount of stock transferred to him, has been decided to be clearly usurious. S.'s contract with Finch is, therefore, usurious, and, consequently, can confer no rights. Thus Johnson must have against S. rights as extensive, as he has against Williamshurst or Finch. The only question is,—whether, as I must establish the right of Johnson against all the defendants, I should further determine what ought to be done, as between S. and the assignees of Finch. Now, I rather think, that I ought to leave any of these parties at liberty to take what advantage he can of the principle—that a court of equity will not relieve against an usurious contract, except on condition of paying the principal money and interest. I shall, therefore, direct that an account be taken of what is due from Johnson on the original contract between him and Williamshurst; and that the Accountant-General shall return what shall be found due on that account, and shall pay over to Johnson the surplus of the stock now standing on the credit of this cause. Williamshurst and the assignees of Finch must have their costs. S. cannot have his costs, because he stands here claiming under an illegal contract.—MS. Chan. Ca. 1823.

White, executor of W. White, v. Wright.—By memorandum of an agreement made the 31st of August, 1815, between the defendant, Ann Wright, and the testator, W. White, (reciting, that the said W. White did, on the 29th day of August instant, at the request of the said Ann Wright,

Usury, if lender has an option to enforce payment of a certain sum in preference to stock.

sell out for her accommodation 400*l.* stock in the 3*l.* *per cent.* consolidated bank annuities, at the price or sum of 55*l.* 15*s.* *per cent.*, and which 400*l.* stock produced the sum of 223*l.*, which W. White had lent and advanced to Ann Wright, on her bond bearing even date herewith, and also on security of a conditional surrender, of the same date, of certain copyhold premises in the manor of Epsom, which she, Ann Wright, did thereby admit and acknowledge; and that previous to the said W. White's selling and transferring the said 400*l.* three *per cent.* consolidated annuities for the accommodation of Ann Wright, she did agree with W. White, within the time or space of one year from the date hereof, if thereto required by W. White, his executors, administrators, or assigns, to transfer, or cause or procure to be transferred, unto and to the account of him, W. White, his executors, &c. the like sum of 400*l.* stock as aforesaid in the said three *per cent.* consols, and likewise to pay, answer, and make good unto him, W. White, his executors, &c. all dividends, interest, and produce which in the mean time he, W. White, his executors, &c. could have received, or would have been entitled to, in case the said 400*l.* stock had remained standing in the books of the Governor and Company of the Bank of England, in the name and as the property of him, W. White, his executors, &c.) Ann Wright, for herself, her heirs, executors, or administrators, by the present memorandum, agreed with W. White, his executors, administrators, or assigns, that she, her heirs, executors, &c. should and would, at her and their own proper costs and charges, on the request of W. White, his executors, &c., on the next transfer day next after the expiration of one year from the day of the date of that agreement, or at any subsequent transfer day when thereto requested as aforesaid, transfer unto and to the account of him, W. White, his executors, &c. in the books of the said Governor and Company, 400*l.* like stock as aforesaid, in the said fund of the said Governor and Company; and likewise should and would in the mean time pay unto W. White, his executors, &c. all dividends, interest, and produce which he, his executors, &c. could have received or would have been entitled unto in case the said 400*l.* stock had remained and continued standing in the books of the said Governor and Company, in the name and as the property of

him, W. White, his executors, &c. At the same time the defendant executed and delivered to the testator a bond, dated the 31st of August, 1815, in the penal sum of 440*l.* conditioned for the payment of 223*l.* and interest to W. White, on the 31st of August, 1816. Defendant also made the conditional surrender of her property in the manor of Epsom, alluded to in the agreement. After W. White's death, viz. on the 3d of December, 1822, the defendant was requested to re-transfer the stock within seven days from that time. The price of 3 *per cent.* consols on the 31st of August, 1815, was 55½ *per cent.* and on the 3d of September, 1816, 61½ *per cent.* and on the 25th of March, 1824, being two days before the trial, the price was 94¼. The question was, whether this contract was usurious.

ABBOTT, C. J.—I am of opinion that the case of *Barnard v. Young*, 17 Ves. 44, ante, 696, n. was rightly decided, and that this is not to be distinguished from it; unless, indeed, it makes a difference that the contract was to be executed by means of two separate instruments instead of being comprised in one. But it was long ago decided, in *Roberts v. Tremayne*, Cro. Jac. 507, that such a circumstance makes no difference. It is true, that in *Barnard v. Young*, the agreement gave in words an option to the lender, either to have the stock replaced or the produce paid to him in money. But the two instruments given to the lender in this case produce the same effect, for he might, were it not for the statutes of usury, enforce either the bond for the payment of money, or the agreement to replace the stock. In *Barnard v. Young*, the defendant had lent the sum of 10,000*l.*, and that not being repaid at the time specified, a new agreement was entered into, securing to him at a further day, either so much stock as the 10,000*l.* would have purchased at the time when it ought to have been paid, or the sum of 10,000*l.* in money at his own option; and there was an undertaking at all events to pay 5*l. per cent.* interest on the principal sum. The Master of the Rolls in giving judgment says, "The lender is at his election to have his principal and interest, or to have a given quantity of stock transferred to him. His principal never was

in any hazard, as he was at all events sure of having that with legal interest, and had the chance of an advantage if stock rose. It was usurious to stipulate for that chance. In fact, the stock did rise, and if the contract had been performed, he would have had principal and interest and a very large premium." I cannot distinguish that case in substance and effect from this. Here, if the lender, after receiving 5 *per cent.* interest on his money, had afterwards, on a rise in the stocks, compelled the defendant to replace the stock sold, he would, as in that case, have had principal, interest, and a premium besides. That is an advantage which by law he was not entitled to contract for. The contract was therefore usurious, and a nonsuit must be entered.

BAYLEY, J.—Looking at the facts of this case, I am clearly of opinion that it falls within the statute of usury, 12 *Ann.* st. 2. c. 16, which enacts, "that all bonds, contracts, and assurances whatsoever for payment of any principal whereupon or whereby there shall be reserved or taken above the rate of 5*l.* in the 100*l.* for a year, shall be utterly void." If then more than 5*l. per cent. per annum* be reserved by means of a collateral advantage either by way of option or otherwise, it is within the statute. A party may lawfully lend stock as stock to be replaced, or he may lend the produce of it as money, or he may give the borrower the option to repay it either in the one way or the other. But he cannot legally reserve to himself a right to determine in future which it shall be. It is not illegal to reserve the dividends by way of interest for stock lent, although they may amount to more than 5*l. per cent.* on the produce of it, for the price of stock may fall, and then the borrower would be a gainer; but the option must be made at the time of the loan. The instruments set out in this case, shew that an option to be exercised in future was reserved. It has been argued that the agreement enabled the defendant at all events, if she chose, to replace the stock; but the agreement is to replace it *if required*, and the bond gave the lender power to enforce the repayment of the principal, which was never put in hazard. Upon principle, therefore, as well as on the authority of the case of *Barnard v. Young*,

I think that the plaintiffs are not entitled to recover in this Action. Holroyd and Littledale, J.'s concurring, judgment of nonsuit was entered. 3 Barn. & Cress. 279.

The subject of this section is also noticed by Mr. Coote, in his Treatise on Mortgages, p. 300, and by Mr. Bythewood, in his Prec. on Conv. vol. iii. p. 245, n.

SECTION V.

Of Copyhold Mortgages.

FOR the general economy of a mortgage of copyholds, see *Ancient mode of mortgaging*, ante, vol. i. p. 433, *in notis*. The ancient mode of mortgaging a copyhold estate was this:—The mortgagor surrendered into the hands of two customary tenants the copyhold premises to the use of the mortgagee, upon condition to be void if the money were paid on a day specified. To avoid the fine to the lord, this surrender was not presented at the next court, but after that court was over, a new surrender was made into the hands of two other customary tenants, *ut supra*, and so from time to time, as often as any court should be holden; but such non-presentment was at law a forfeiture; and Lord Keeper North, in an *Anonymous case* in Skin. 142, pl. 13, refused specific performance of such a contract, which caused this troublesome mode of mortgaging to fall into disuse.

At the present day mortgages of copyhold estates are generally effected by a deed of covenant to surrender the premises to the use of the mortgagee, with a proviso that on payment of the money the surrender shall be void. The deed should also contain a covenant for payment of the money, and covenants for the title. When the surrender is made, the surrender and condition should be both entered on the rolls, the entry of the condition to follow immediately the entry of the surrender. 1Watk. Cop. 182, 2d edit. If the repudiated mode of inserting the condition in a separate deed be adopted, it should nevertheless be entered on the rolls; for if the deed be lost, the proof of the condition might be difficult, and frequently impossible, *ibid.* 183. In case the money is paid at

Modern mode, and consequence.

the day, the mortgagee acknowledges the re-payment and authorises the steward to vacate the surrender. Such acknowledgment of satisfaction, the warrant to vacate, and the actual vacation of the surrender, are then entered on the rolls; on which the surrenderor becomes possessed of his former estate, and is in *statu quo prius*, without any re-admission or fine, although the mortgagee may have been admitted; *Gilb. Ten.* 276. *Simmonds v. Lawnd*, Cro. Eliz. 239. If the surrender has not been presented according to the custom of the manor, no notice need be taken of it on the rolls. *Fawcett v. Lowther*, ubi infra. But if *the condition be broken*, and the surrenderee be *admitted*, whereby an equity of redemption only remains in the surrenderor, then his re-admittance will be necessary, *Fawcett v. Lowther*, 2 Ves. 300; and a fine will be incurred, 1 Watk. 190; which admission will break the line of descent of an estate taken from a maternal ancestor. *Roe v. Baldware*, 5 T. R. 104. *Martin v. Strachan*, Willes, 444. *Benson v. Scott*, 12 Mod. 49. *Doe v. Morgan*, 7 T. R. 103. As to entry of satisfaction, the condition is express, that on payment of the money the surrender shall be void. On payment therefore, within the prescribed time, the surrender becomes void *ipso facto*, and an acknowledgment of satisfaction by the mortgagee is now usually entered (regardless of the above formal mode) on the margin of the roll immediately against the surrender, which is signed by the surrenderee, and this is clearly sufficient when the money is paid at the day. But the same mode of discharging a mortgage is also adopted when the day is past, if the money be paid at any time before admittance; yet, says Mr. Scriven, there is an evident irregularity in so doing, after the condition is forfeited, 1 Scriv. Cop. 246, n. (187), 2d edition.

Equity of redemption.

When a mortgage is forfeited, the equity of redemption descends to the customary heirs or sequels of the surrenderor, as the legal estate would have done; *Fawcett v. Lowther*, 2 Ves. 300. In which case a question arose, whether there could be an escheat to the lord of the equity of redemption on a copyhold mortgage. Lord Hardwicke said it had never been determined nor should he determine it then: though it was a considerable argument, that, if otherwise, there would

be an end of escheats, because all the lands in England would soon be in trust, yet that was contrary to the old doctrine, 2 Ves. 304. On the subject of equitable escheats, see *ante*, vol. i. p. 252, n. (G), and further, Belk's Supp. to Ves. sen. 348-9. *Williams v. Lonsdale*, 3 Ves. 752-6, and Scriv. Cop. 463, n. 27, 2d edition. An equity of redemption of copyholds has been said to be a *freehold* interest, for that it will pass by release alone, without surrender, see 1 Pres. Abs. 436. Fearne P. W. 108. 1 Bar. Prec. 349, n. (2), 1st edition, referring to 1 Watk. Cop. [60]. But Mr. Watkins does not call it a freehold interest, he merely says, that it may be assigned or devised without a surrender, and it cannot without a considerable sacrifice of principle be so denominated. Therefore a bargain and sale of an equity of redemption of copyholds is not the most formal assurance, though a deed is certainly essential; for, after admittance of the surrenderee, the equity of redemption cannot properly be extinguished by a surrender, unless indeed such surrender might possibly be held to operate as a release. Then a question may arise whether, on such surrender operating as an assurance of a *quasi* freehold interest, a fine to the lord will accrue. It is settled, that on a release of the equity of redemption by deed no fine will be incurred; *Hall v. Sharbook*, Cro. Jac. 36; and by a parity of reason no fine should be payable in the instance supposed. An equity of redemption in copyholds will pass by the will of the mortgagor without a surrender to the use of such will, *Macnamara v. Jones*, 1 Bro. C. C. 481; *Gibson v. Stiles*, 9 Mod. 267, *ante*, vol. i. p. 433, *in notis*, provided the mortgagee be admitted, for otherwise a surrender to a mortgagee, who has not been admitted, will not make a surrender by the mortgagor to the use of his will unnecessary: *Kenebel v. Scrafton*, 8 Ves. 30; *Doe v. Wroot*, 5 East, 132. Whether a surrender to the use of a will is valid and subsisting, notwithstanding a subsequent surrender to a mortgagee who has not been admitted, has not yet been decided. Mr. Sugden thinks it quite clear that it would be held good, because the surrender to the mortgagee does not pass the estate out of the surrenderor before admittance, nor can the last surrender, as in the case of a sale, be deemed an absolute revocation by operation of law of the first surrender; and it is not denied

[1070]

Potentially in assignees till bargain and sale from commissioners to purchaser.

that a man may, after a surrender to the use of his will, surrender to a stranger without any express revocation of the former surrender; *Fitch v. Hockley*, Cro. Eliz. 441. "But it does not therefore follow," continues the learned writer, "that a surrenderer to a mortgagee is of itself a revocation of the prior surrender; on the contrary, as such a surrender does not preclude the necessity of a subsequent surrender to a will, where there is no prior one, it would seem that it has only a partial operation, which leaves the prior surrender untouched, and precludes the necessity of another surrender for the same purpose. Gilb. Uses. 74. Sugd. n. (5), 3d edition. A doubt has been suggested, as to the power of excepting copyholds in the assignment from commissioners of bankrupts to the assignees chosen by the creditors, the act of 5 Geo. 2. c. 30. s. 26, having provided that the commissioners shall assign "every such bankrupt's estate and effects" unto the persons chosen assignees by the creditors, 2 Mont. Bank. Laws, 130, 131. But this doubt has been removed by the case of *Holland, Ex parte*, 4 Madd. 483, where it was held, that a good title to a leasehold estate can be made by bargain and sale from the commissioners to the purchaser without an assignment to the assignees, et vide Scriv. Cop. 362. But though excepted in the bargain and sale, the equity of redemption, till assignment, is potentially in the assignees. *Lloyd v. Lander*, 5 Madd. 288. S. C. ante, p. 971, n. (N). By the new Bankrupt Act, 6 Geo. 4. c. 16. ss. 68, 9, all difficulty on this head is obviated.

Priority of surrender.

The mortgagor may, in the mean time, and until the admittance of the mortgagee, make a second surrender, which will be good, if the first surrender be not perfected by admittance. Thus, in *Burgoyne v. Spurling*, (Cro. Car. 273. 283, 284. S. C. Sir W. Jo. 306.) A. surrendered copyhold lands into the hands of customary tenants, to the use of B. in fee, on condition to be void if A. paid B. a certain sum on the first of July following; and afterwards, before payment of the money, A. surrendered by the hands of customary tenants to C. in fee, and then paid the money according to the condition, and surrendered in like manner to D. in fee, and the surrender to D. was presented at the next court; and subsequently, at the same court, the surrender to C. was pre-

sented; but the conditional surrender to B. was not presented; it was adjudged that C. should have the land. Et vide further as to priority between a mortgagee and annuitant, *Wilson v. Stafford*, Amb. 181.

Where a conditional surrender was forfeited, and it was desired that the old surrender should be taken up, and a new one made, but the lord insisted that the mortgagee should be admitted and pay a fine, and caused proclamations to be made for that purpose, the court of Chancery refused to interfere, except to direct an issue to try the question, whether the lord was bound by custom to accept the second surrender. *Tredway v. Fotherley*, 2 Vern. 367. But Mr. Watkins questions the authority of this case, on the ground that the lord cannot compel the surrenderee to be admitted without special custom, and that a mortgagee may bring his bill of foreclosure before admittance. 1 Watk. Cop. [189,] citing, for the former position, *Baspool v. Long*, Cro. Eliz. 879. S. C. Yelv. 1. [1 Roll. Abr. 568. 1 Show. 30. 83. Et vide *King v. Dilliston*, 1 Salk. 386. S. C. Carth. 41.] and for the latter, *Sutton v. Stone*, 2 Atk. 101. In *Fawcett v. Lowther*, 2 Ves. 302, Lord Hardwicke said, the general custom of copyholds was, for the surrenderee to come and have the matter presented at the next court; but there were several manors where the tenant need not come under three courts, and such custom was good, 2 Ves. 302. By special custom, the surrender may be presented at any subsequent court, *Moore v. Moore*, 2 Ves. 602.

On breach of condition, lord may insist on mortgagee's admission. Sed qu.

Mortgagee may foreclose before admittance.

The statute 55 Geo. 3. c. 192, (an act to remove certain difficulties in the dispositions of copyhold estates by will), extends only to supply surrenders in form, and not surrenders in substance. Therefore, where a feme covert omitted to surrender to the use of her will, it was held that this was not a case within the statute. *Doe v. Bartle*, 5 Barn. & Ald. 492. 1 Dow. & Ry. 81. The reasoning which induced this adjudication was, that the customs of the manor enabled a feme covert to pass by her will copyhold lands, which had been surrendered to the use of such will by the husband and wife jointly, the wife, on that occasion, being examined by the steward separate and apart from her husband, and con-

Sugden's Act supplies formal, not substantial, surrenders.

senting. Now, the object of the statute was to prevent any inconvenience arising from a mere omission to surrender in the case of an adult legally capacitated. But, where a private examination was an essential part of the surrender, the legislature never intended to cure an omission in that important particular: such an extension of the statute would be pregnant with the most serious consequences. The rule of construction laid down by Lord Coke, 2 Inst. 386, was exactly applicable, that if a case be out of the mischief intended to be remedied by the statute, it should be considered to be out of the purview, although it might be within the words; and the [1071] court was quite satisfied that this case was out of the mischief intended to be remedied, 1b. 90 and 501; et vide 7 T.R. 103. Ante, vol. i. p. 433. Coe. Mort. 112.

*Agreement to
surrender bind-
ing on whom.*

A contract or agreement to surrender copyholds, or a surrender which is void for want of presentment in due time, will be enforced in equity in favor of a purchaser or mortgagee against the heir or widow of the mortgagor, or the person next in succession, where the estate is of inheritance, or the first life in a copy has a power to dispose of the estate; *Davie v. Beardsham*, 1 Ch. Ca. 39. *S. C.* 3 Ch. Rep. 4. Nels. Ch. Rep. 76. 2 Freem. 157. 9 Mod. 75. *Barker v. Hill*, 2 Ch. Rep. 218. *Bradley v. Bradley*, 2 Vern. 165; and against a devisee (though a child of the testator) or a volunteer, *Martin v. Seamore*, 1 Ch. Ca. 170; or the assignees under a commission of bankrupt, *Taylor v. Wheeler*, 2 Vern. 564. *S. C.* 2 Salk. 449. 10 Mod. 492. 2 Ves. 633 (and see *Bartlett v. Tuchin*, 6 Taunt. 259); or a surviving joint-tenant, *Hinton v. Hinton*, 2 Ves. 631. In *Pattison v. Thompson*, Finch, 272, A. mortgaged freehold and copyhold lands to B., and A. agreed to surrender the copyhold estate, but died before it was perfected. It was decreed that the heir of A. when of age, should make a sufficient surrender *nisi causâ* within six months after his attaining twenty-one. So in *Keen v. Sparrow*, *ibid.* 331, a surrender was decreed, the mortgage being of copyhold lands, by deed, without any agreement to surrender.

*Mortgage of
manor by lord.*

If a lord of a manor mortgage the manor in fee to A., and afterwards purchases copyholds held of the manor, and takes

surrenders of them to himself in fee, they will enure to the benefit of the mortgagee; and a settlement by the lord of all his estate mortgaged to A., will pass the equity of redemption of such surrendered copyholds. *Doe v. Patt*, 2 Deucl. 710. In the same case it was held, that if a mortgagor devise the mortgaged premises, and afterwards pays off the mortgage, and the mortgagee conveys the legal estate to a trustee in trust for the mortgagor, such a transfer of the legal estate will not operate as a revocation of the will. *Ibid*.

Where a surrender was in these words :—" To the use and behoof of the parish church and chapel of Saint Pancras, in and about repairing the same, and otherwise for the benefit thereof," it was held that the trustees might apply the rents and savings of the premises in question to the reparation of the church, but could not mortgage; and they were enjoined from raising money on the premises by fines for long leases, or by mortgages, or otherwise, accordingly. *Attorney-General v. Foyster*, 1 Anst. 116.

Power to mortgage not included in trust to repair or otherwise.

A mortgagee not being tenant until admittance, cannot in the mean time pass the lands by surrender. If he make a surrender, it will be merely void; but he may make an equitable transfer, and compel the lord to admit his assignee by *mandamus* without a double fine. *King v. Hendon*, 2 T. R. 484. The mortgagee may also devise the lands, and they will pass in equity. *Davie v. Beardsham*, 3 Ch. Rep. 4; but the devisee will not be entitled to admission as legal tenant; for a legal devise of copyholds cannot be made before admittance. *Doe v. Tosfield*, 11 East, 246. And therefore, although the devisee be admitted, the surrenderor, or his heir, will still remain tenant to the lord. But equity will consider the legal tenant to be a trustee for the devisee. The proper course to be pursued, probably, would be for the heir of the mortgagee to be admitted, and to make a surrender to the devisee. In a recent case it was held, that the devisee (who had been admitted) of a devisee who had died without admittance, could not maintain ejectment as the legal tenant. *Doe v. Vernon*, 7 East, 8. A person who has mortgaged a copyhold estate, is not a competent witness in an ejectment

Mortgagee may assign and devise before admittance.

Ejectment.

concerning it; for the equity of redemption still resides in him. *Anon.* 11 Mod. 354. The admittance of the mortgagee relates back to the time of the surrender. *Vaughan v. Atkins*, 5 Burr. 2785. From this doctrine it follows, that the surrenderee may, in ejectment, after admittance, lay his demise in the interim between the admittance and surrender, and recover mesne profits from the time of the surrender. *Holdfast v. Clapham*, 1 T. R. 600. *Roe v. Hicks*, 2 Serjt. Wils. 15.

Heriots.

As the mortgagor remains tenant to the lord until the admittance of the mortgagee, the copyholds will, on his death, descend on his customary heir, and a heriot will become due. *Forsel v. Welsh*, Cro. Jac. 403. If the heriot be paid, and the heir claim to be admitted, Mr. Watkins makes a *quære* whether, inasmuch as the admittance of the mortgagee, or his heir, always relates to the time of the surrender, so as to avoid all intermediate rights and interests contrary to the surrender (such as the free-bench of the surrenderor's widow, and the like, *Benson v. Scott*, 1 Salk. 185. *Vaughan v. Atkins*, 5 Burr. 2785), a heriot will not, on such admittance, become due, as if the surrenderee had died seised, and if so, whether the lord ought not to return the first heriot? 2 Watk. Cop. 158, 2d edition. This question remains undecided.

[1072]

Waste.

Finally, it is observable, that a mortgagee of a copyhold estate may pull down ruinous houses, and build better, to prevent a forfeiture: and that a surrender by a mortgagee of copyholds to the use of his will, is no proof that he considered it irredeemable. *Hardy v. Reeves*, 4 Ves. 480.

SECTION VI.

Of Mortgages of Colonial Property.

Commission not allowed to mortgagee, acting as consignee of produce of West India estates mortgaged.

COURTS of justice in England apply to the relation of mortgagor and mortgagee upon West India mortgages all the principles that exist as to that relation here, except where particular laws, or the usages of the different Islands, demand a contrary or varied administration. 9 Ves. 271. By the laws of the assembly of Jamaica, (Act, 1740), mortgagees in possession are declared not entitled to any commission, except

what is paid to the factor for his commission; and in case any greater commission is demanded, a penalty of 100*l.* for every offence is imposed, with a proviso, that it shall not extend to commission for the sale of negroes and other commodities sent to the Island. 9 Ves. 268. On this Lord Eldon observed, that he had formed an opinion how far mortgagees were entitled to commission while resident in the Island; but he had some difficulty in declaring that opinion, lest he should prejudice the question. But his Lordship was clear, that the mortgagee, while resident in England, could not charge commission either according to the laws of the Island, or on a due interpretation of the mortgage contract. *Chambers v. Goldwin*, 9 Ves. 273. *S. C.* 5 Ves. 834, et ante, 954, n. (O). In *White v. Hall*, 12 Ves. 321, the court held, that it had no authority to set aside a foreclosure and judicial sale of an estate in the colonies, obtained under the process and judgment of a court having competent jurisdiction, not only intrinsically, but under the acts of the parties. It therefore refused the injunction prayed.

The old practice of mortgaging in the Island of St. Vincent, was to insert a covenant from the mortgagor to consign his produce to the mortgagee during the continuance of the mortgage; but this has lately been held be a usurious covenant, securing to the mortgagee more than six *per cent.* as allowed by the statute 14 Geo. 3. c. 79. It was then doubted whether the deed was not good *pro tanto*, as the specific independent covenant might be rejected *in toto* without interfering with the remainder of the deed; but in the case alluded to, deeds, containing such a covenant, were declared usurious and absolutely void, on the ground that the agreement appeared to be part of the consideration for the loan, which could not be separated from the entire contract. *Whitfield v. Sayers*, 1818, Court of Chancery, Saint Vincent. Shep. Col. Prac. 125. Mr. Shepherd adds, "It is now the universal practice to omit this stipulation, and yet it is always tacitly complied with; because the produce must be shipped, and the planter will naturally ship it to his own correspondent, in liquidation of the advances he is under to him, in preference to a stranger; and thus usury may be said to exist in every mort-

Covenant in mortgage-deed, that mortgagee shall be consignee, void as usurious.

gage between an European merchant and West India proprietor. "The policy of this construction," the learned writer continues, "may be subject to considerable doubts; for if the covenant were continued, it would only compel the planter to pay his debts, which no honest man ought to object to; but the omission of it enables the profligate to ship his produce to other persons than his mortgagee, and to dispose of the proceeds; thereby defrauding the merchant of the very consideration on which he advanced his money." Shep. Col. Pra. 126. This case seems adverse to the observations of Lord Eldon in *Bunbury v. Winter*, 1 Jac. & Walk. 261, where a party becoming surety for a West India merchant for a debt to the crown, procured a conveyance of a plantation estate as an indemnity, with covenants appointing him consignee, and that he should continue to have the consignments for five years after his liability ceased; the court could not consider the deed so oppressive as to interfere upon motion for a receiver, and refused the motion accordingly with costs, 1 Jac. & Walk. 255; on which occasion the Lord Chancellor is reported to have used the observations, ante, vol. i. p. 305, note (E), sec. xiii.

[1073]

Colonial property, ineligible security.

West India mortgages are almost always for a floating debt; a security given for a certain sum, which is to cover what may be the balance, per Lord Loughborough, 4 Ves. 126. Lord Northington has said, that in his time every body knew the difficulty of obtaining possession under a mortgage in the West Indies, though that difficulty did not exist on a purchase. 2 Eden, 114. Whether an objection arises to a mortgage or colonial property on this head at the present day, the Editor has not been able to ascertain; but though he can conceive it to be not the most eligible security for a mortgagee, yet he is not aware of any violent objection, further than the risk of seas and the chance of war, to the loan of money on the mortgage of colonial property. A form of such mortgage will be added in the Third Volume.

It merely remains to observe, that letters of administration of an intestate's effects in India, the proceeds of which have been remitted to England, will prevail over an administration

in England. *Currie v. Bircham*, 1 Dow. & Ryl. 35. But an interim administration granted in England will be good until the will or Indian administration arrives. *Metcalf, in re*, 1 Adams, 343.

SECTION VII.

Mortgages of Ships.

A TRANSFER of a ship at sea to a vendee resident in the port in which the ship is registered, will not be available, unless copies of the bills of sale are delivered to the custom-house officers in that port within a reasonable time after the sale. *Richardson v. Campbell*, 5 Barn. & Ald. 196; et vide S. L. *Moss v. Charnock*, 2 East, 399. *Hubbard v. Johnson*, 3 Taunt. 206, and *Palmer v. Mozham*, 2 M. & S. 43. In a bill of sale of a ship, the not setting forth the true consideration, and want of proper stamp, though they subject the parties to a penalty, do not avoid the instrument. *Robinson v. M'Donnell*, 5 M. & S. 234. And it should be remembered, that in equity, relief cannot be had to cure a defective assurance for want of compliance with the strict regulations of the Registry Acts (cited vol. i. p. 25, n. (G), as in other cases; *Speldt v. Lechmere*, 13 Ves. 589; and fraud is no exception, 1 Madd. 400; though in a recent case the Lord Chancellor is said to have expressed a doubt, ib. 406. But a declaration of trust will not, it seems, vitiate the legal effect of the bill of sale, if the requisites of the statutes are complied with. *Heath v. Hubbard*, 4 East, 110. A bill of sale, with a stipulation that it was made as a lien or security for money lent, and that the vendee might sell and transfer, has been held to be a contract, not of lien but of mortgage or pledge. *Wilson v. Heather*, 5 Taunt. 642. And an instrument under seal, executed by the master, (who was also the owner) for the re-payment of money borrowed for repairing the vessel, thereby stipulating that the vessel should be and remain a security by way of bottomry for the re-payment thereof, and that as well his executors, &c. as the said vessel, should be bound in the penal sum of so much, has been decided to operate as a mortgage of the vessel; so that the party may take possession; after which, his right will not be defeasible by a subsequent execution at the suit of another creditor. *Lad-*

*General rules
as to transfer
of property in
ships.*

broke v. Crickett, 2 T. R. 649. It has also been determined, that there can be no title in a ship arising by implication in equity on acts between the parties; that the register is conclusive evidence of the property even between joint and separate creditors; and that parol evidence is not admissible in equity to shew that the money was advanced out of the joint concern. *Yallop, Ex parte*, 15 Ves. 60. *Houghton, Ex parte*, 17 Ves. 251. *Curtis v. Perry*, 6 Ves. 739. *Jones, Ex parte*, 4 M. & S. 450.

Doubt concerning mortgage of ships removed.

It was once thought there could be no valid mortgage of a ship, and it was said that no instance had occurred of a mortgage of a ship since the Registry Acts. The Vice Chancellor, in a late case, felt surprised at this assertion; observing, that he was much struck when he heard that mortgages of ships depended merely upon honor; for that before the Registry Acts, ships were mortgageable, and there was nothing in the spirit or letters of those acts to confine the transfer to an absolute sale, 1 Madd. 395. In confirmation of this remark, it is observable, that in *Hibbert v. Rolleston*, 3 Bro. C. C. 571, and in *Mestaer v. Gillespie*, 11 Ves. 626, ships were mortgaged, and no objection taken to the security on the above ground. So in the late case of *Wilson v. Heather*, 5 Taunt. 642, the court considered the mortgage of ship as valid, provided the forms required by the Registry Acts were attended to. In like manner, in *King v. King*, 3 P. Wms. 360, mention is made of a decree of Lord Harcourt on the mortgage of a ship at sea, where the executors of the mortgagor were decreed to pay the money for which the ship was mortgaged. Difficulties, it is said, are raised by the custom-house officers refusing to register a mortgage, that species of transfer being incompatible with the form prescribed by the act. The Vice Chancellor, in the case alluded to, made inquiries on this head of the custom-house officers, and reported that a very strong notion seemed to have prevailed with them, as with the profession, that considerable difficulties occur in the way of mortgaging ships in consequence of the prescribed form of indorsement in the 34 Geo. 3. c. 68. s. 15, which is adapted only to a total and absolute sale, and will not apply to a transfer by mortgage, the mortgagor not being properly within the term "seller" nor can

he truly declare, that he has "sold all his right, share or interest, in and to the ship or vessel," nor is the mortgagee properly a purchaser. The consequence (continued his Honor) was, that mortgages of ships had sometimes been made by two instruments:—one an absolute conveyance of the ship, the other a deed of defeasance; the former only being registered at the custom-house. This course, however, was founded in mistake. There was no doubt that the power of mortgaging a ship existed as fully since the Registry Acts as it did before, provided the requisites, prescribed by the act were observed, and there was no difficulty in effecting this. Sir T. Plumer then pointed out the regular mode of making a mortgage of a ship in the following words:—

"The mortgage should be made by the usual bill of sale of the ship, containing, in the same instrument, a defeasance or condition of re-transfer on payment of the mortgage-money. The bill of sale must contain the recital of the certificate, as the act directs, and must be fully indorsed on the certificate of registry, if the ship be in port; or if at sea, a full copy of it must be transmitted to the custom-house. The form of indorsement will be the one prescribed by the act, but with the addition of the defeasance, to express the true nature of the contract between the parties, whenever it becomes material to resort to evidence of it. There is nothing in the act to prevent such an addition being made to meet the exigency of the case. A greater deviation from the form prescribed by the act was sanctioned by the Court of Common Pleas, in the case of a partial transfer of the interest of a ship. *Underwood v. Miller*, 1 Taunt. 387. And an ingenious living writer, (the present Lord Chief Justice of the King's Bench, in his Treatise on Shipping, p. 44), has well observed, that the acts seem to require a similar deviation in the case of a mere contract for the sale of a ship, which the act directs to be registered, but which cannot be in the exact words of the form prescribed. A liberal interpretation of the act must be adopted to make form give way to substance. In the subsequent forms to be observed at the custom-house, the defeasance will probably not be noticed, either in the entry indorsed, or the oath, or in the memorandum made in the book of registers; but adhering simply to the form prescribed by the act, it will be registered as an abso-

Mode of mortgaging ship prescribed.

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late bill of sale. But neither the mortgagor nor mortgagee can suffer by that omission. The statutes invalidate the transfer only in the event of a neglect of the prescribed requisites by the parties, not for any mistake or neglect by the public officers; and, in the event of any dispute of the title in a court of justice, the proper evidence of title will be the original documents themselves, not any imperfect abstract made of them at the custom-house. By that abstract, the mortgagee will, it is true, appear the sole and absolute owner, and so he is, *pro tempore*, till redemption; but the mortgagor's right to call for a re-transfer will appear from the bill of sale fully indorsed on the certificate, if the ship be in port, or if at sea, by a full copy transmitted to the custom-house. It is a mistake to suppose that the owner of a ship cannot make any transfer of property without parting entirely and irredeemably with all his interest." *Thompson v. Smith*, 1 Madd. Rep. 395. 413.

Mortgagee not entitled to profits till in possession, but liable for stores from time of registry.

A mortgagee of a ship cannot, in his own name, recover any of the earnings of the ship, accrued due while the mortgagor is in possession. *Chinnery v. Blackburn*, 1 H. Bl. 117, n. The action in this case, said Lord Mansfield, must have been founded on the idea, that the mortgagor in possession was the servant and agent of the mortgagee, which was not the case; for, till the mortgagee took possession, the mortgagor was owner to all the world; he bore the expences, and he was to reap the profits, *ibid*. Hence, the necessity of a power of attorney, enabling the mortgagee to recover any part of the earnings of the ship made in consequence of contracts with the mortgagor. How far a mortgagee of a ship, not in possession, will be liable for supplies and necessaries furnished to the ship, is a point that has been much disputed. It was alluded to in *Westerdell v. Dale*, ante, vol. i. p. 183, as also in *Martin v. Paxton*, 1 Holt on Ship. p. 354. *Annett v. Carstairs*, 3 Campb. 354, and *Twentyman v. Hart*, 1 Stark. 366. But these cases were contradictory; and it was thought at least possible, that when the point should receive a solemn determination, the mortgagee might be held chargeable for the expences of the ship from which he had been led to expect his security. Abbott on Ship. part 1, chap. i. sec. 14. This conjecture seems verified; for mortgagees of a ship, having their names inserted in the registry, (and without which their security could not be

effected) have been held liable to creditors in respect of stores supplied for the use of the ship; and the possession of one owner has been decided to be the possession of all. *Machel, Ex parte*, 1 Rose, 447. Vide etiam *Jackson v. Vernon*, 1 Hen. Bl. 114. *Young v. Brander*, 8 East, 10. *Trewhella v. Rowe*, 11 East, 435. *Fraser v. March*, 13 *ibid.* 238, and 2 Campb. 517. Lastly, it may be useful to subjoin, that the register alone is not even *prima facie* evidence to charge a person as owner of a ship, in a suit between private individuals, *Fraser v. Hopkins*, 2 Taunt. 5; nor is the bill of sale, unless it appears to have been accepted by the assignee. *Tinkler v. Walpole*, 14 East, 226; et vide *Cooper v. South*, 4 Taunt. 802, and *Pirie v. Anderson*, *ibid.* 652. There is no jurisdiction in bankruptcy to compel bankrupt to perfect bill of sale of a ship. *Stewart, Ex parte*, 1 Glyn & Jam. 344. See also a strong case as to the freight, *Camden v. Anderson*, 5 T. R. 709. The subject of this section, with the consideration of shipping interests generally, has several times occupied the attention of Parliament, since the last edition of this Treatise. In 1823 an act was passed, which directed the registering officer to enter a conditional sale as well as an absolute one, see ante, vol. i. p. 26 *a*; but before the course of printing had brought us to this place that act has been repealed, or rather the provisions of it have been consolidated in another act, which will be more convenient to introduce in the Third Volume, appended to the precedent of a mortgage of this species of property.

SECTION VIII.

Of the Statutes Merchant and Staple.

THE mercantile securities of statute merchant, statute staple, and recognizance, are now nearly superseded by the more prevalent mode of mortgaging by way of conditional alienation. Nevertheless, it may fairly be expected in a work of this nature, that some mention should be made of these nearly obsolete forms of security. A statute merchant, then, is a bond on record, provided by the 13 Ed. 1. stat. 3. c. 1, which enacted, that a merchant who would be sure of his debt might cause his debtor to come before the Mayor of London, or some chief warden of the city, and one of the clerks that the king should thereto assign, who should acknowledge the debt,

Statute merchant.

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and the day of payment; that this acknowledgment should be enrolled by one of the clerks, the roll to be double, whereof one part should remain with the mayor, the other with the clerk; that one of the said clerks should write an obligation, to which the seal of the debtor should be put, together with the king's seal. If the debtor did not pay at the day limited, *all* his lands should be delivered to the merchant, to hold to him until such time as the debt were wholly levied; and the merchant should have such seisin in the lands and tenements delivered to him or his assigns, that he might maintain a writ of novel disseisin if he were ousted. An obligation under this statute has obtained the name of a pocket judgment, for that on failure of payment on the day assigned, execution might be awarded, without any mesne process to summon the debtor, and without the trouble or charges of producing evidence to convict him. Bac. Abr. Ex. 689. On this act it has been held, that a material variation in perfecting the security from the form prescribed, will render the statute-merchant void, and that the party may be relieved in a writ of *audita querela*, 2 Saund. 69 a. n.; but although void as a statute, it may still be good as an obligation, being under the seal of the debtor. *Hollingsworth v. Asme*, Cro. Eliz. 355. 461. 494. But it has also been held, that the omission of an immaterial circumstance will not vitiate it, such as the omission of the day of payment, for then the debt will be deemed to be paid presently (Sir W. Jo. 52. Bridgm. 19), or if the inrolment be written by the servant of the clerk, and not by the clerk himself, or the like. Winch, 83.

Statute-staple.

In the reign of Edw. 3. it was thought expedient to appoint certain towns where a fair of the staple commodities of the kingdom (such as wool, leather, fells, and lead,) might be held for the trade of foreign merchants. To protect them in that exclusive branch of traffic, the statute of staples (27 Ed. 3. stat. 2.) made it felony for any English merchant to export the staple commodities of the realm. It also authorized the mayor of the staple to take recognizances of debts made before him in the presence of the constables of the staple, or one of them, and declared that each staple should have a seal kept in the possession of the mayor under the seal of the constables, and that each obligation made on such recognizances should

be sealed with the seal of the staple,—that the mayor might take the body of the debtor and commit him to prison, if found within the staple, until he made agreement for the debt and damages, and that he might seize the goods of the debtor within the staple, and deliver them to the creditor on a true appraisement, or sell them and deliver the money to the creditor; and if the debtor was not within the staple, nor goods to the amount of the debt, the same should be certified into Chancery, under the seal of the staple on which a writ should issue to take the body of the debtor and his lands, tenements, and goods, and the writ should be returned with the value of the lands and goods, and due execution should be made from day to day in like manner as in the case of a statute-merchant.

This statute being found convenient, it was by connivance soon extended to merchandize not within the staple; to suppress which, and yet to give the creditor a similar security, the statute 23 Hen. 8. c. 6, provided the *recognizance in the nature of a statute-staple*, enabling the Justices of the King's Bench or Common Pleas, the mayor of the staple of Westminster, or the Recorder of London, to take recognizances of any debt which should be sealed with the seals of the debtor, of the king, and of the person before whom it was acknowledged and enrolled, and whereupon the same advantage might be had as upon a statute-staple.

*Recognizance
in nature of
statute staple.*

Recognizances by the common law are obligations acknowledged by the debtor before any of the judges in or out of term, and in any part of England, or before the Lord Chancellor, or any other person for such purpose appointed by the king; or by the custom of London, before the Lord Mayor and an Alderman, or Lord Mayor singly, and perfected by enrolment in some court of record, and on which execution may be sued out, in like manner as on a judgment. If execution be not sued out within a year and a day after the day assigned in the recognizance, a writ of *scire facias* must be enrolled within six months after acknowledgment. 2 Saund. 8. And they bind lands in the hands of a purchaser from the time of enrolment. Bac. Abr. Execution, 693. The writ of

*Recognizance
at common law.*

execution on a statute or recognizance, is a writ of *extent* or *extendi facias* against the body, lands, and goods of the debtor, (2 Tidd's Prac. 1031, 6th edit.) under which the sheriff must impanel a jury to extend the lands, as upon an *elegit*. 19 Vin. Abr. 557.

Nature and extent of estate acquired by these securities.

These securities possess one advantage over judgments. A judgment creditor, having a single judgment, cannot take more than a moiety of the lands of his debtor in execution, while a creditor under a statute-merchant, statute-staple, or recognizance, may take the *entirety* of the lands in execution. After extent by execution, and a writ of *liberate* sued and returned, a creditor by either of these latter securities will have an estate of a chattel interest, entitling him to hold the lands until he be satisfied his debt. 3 Pres. Abst. 340. The lands taken under a statute or recognizance, will, as in the case of an *elegit*, descend on the personal representatives of the conusee as chattel interests; 1 Inst. 42, a. 250, b. 2 Inst. 396. 2 Vent. 327; and they are to be holden until the conusee has received not only his debt, but also his costs of suit and reasonable expences, which the Chancellor is to assess, and, therefore, although the time of the statute is expired, the conusor will be put to his *scire facias* before he can regain possession of his lands. 4 Co. 67. 2 Roll. Abr. 479. If the debt be 100*l.* and the extended value 5*l.* per annum, the estate will continue to the end of twenty years, but the estate may determine at an earlier period by casual profits, and the account may be taken at law on the writ *venire facias ad computandum*. At law, the extended value only is regarded, and this value is generally far below the actual value, so as to make an allowance for the loss of interest, &c. But in equity the estate is considered merely as a security for the debt—the interest of the tenant being redeemable, like a mortgage, on payment of principal, interest, and costs; and the account will be taken according to the actual, not the extended, value. *Marsh v. Lee*, 2 Vent. 338. Whether any specific period is fixed, after which a court of equity will not administer this relief, is a point on which no decision occurs. 2 Pres. Abs. 24. These interests being of a chattel quality, may be assigned as other chattel interests,

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without livery of seisin, or may be bequeathed by will as personal estate; and, on the death of the tenant, they will devolve to his executors, or personal representatives, or pass to a legatee by bequest and assent to that bequest, *ibid.* The estate may be in reversion, or in possession, and one estate of this description may, it should seem, merge in another estate of the like description. *Dighton v. Greenville*, 2 Vent. 231. Collis's Parl. Ca. 64, and 3 Pres. Conv. 177. 195. Lands purchased subsequently to the acknowledgment of the statute or recognizance will, as in the case of a judgment, be bound by the lien; Bac. Abr. Exec. 698, and as the statute was created for the benefit of merchandize, an alien merchant may extend the lands under a statute, and hold them against the king. Bac. Abr. Aliens, 138. After the debt and costs are satisfied, the proper discharge is the entry of satisfaction on the record; though, according to Shep. Touch. 358, the estate will not determine, except there be a judgment on the writ *venire facias ad computandum*, ascertaining that the debt is satisfied. In Ireland, the 9 Geo. 2. c. 5. Irish Stat. after *reciting*, that judgments, statutes staple, and statutes merchant, are frequently assigned for valuable considerations, and to protect the purchase of estates; but are no more than equitable securities in the hands of the assignees; and *reciting*, that the assignees cannot revive or discharge in their own names, and that the conusee may enter satisfaction without their knowledge, enacts, that the conusee of any judgment, &c. his executors or administrators, &c. who shall assign the same, shall perfect a memorial of such assignment, in a certain manner directed by the act, which memorial shall be enrolled as there directed; *after which enrolment* the assignee of such judgment, &c. his executors, administrators, and assigns (and no other person), may *revive* in their own names, reciting the special matter, and may sue out execution in their own names, and may release or discharge the same as fully as the conusees might. It further enacts, that the conusor may plead payment to the assignees, and the *assignees* may assign in the same manner as the conusor. It also enacts, that the conusor shall have the same remedy and defence, both in law and equity, against the *assignees of the judgment*, as he might have had against the *conusee*, if there had been no assignment. The 25 Geo. 2.

c. 14. s. 1, reciting that doubts had arisen on the construction of the 9 Geo. 2. c. 5, enacts, that the assignees of any judgment, his executors, &c. may bring *debt* on such judgment, *in his own name*, and shall be considered *to all intents and purposes both at law and in equity* as standing in the place of the assignors. These provisions are peculiar to Ireland.

For more on the subject of these securities the reader is referred to 2 Cru. Dig. 50. 2d edit. Shep. Touch. c. 20. Tidd's Prac. 1100, et seq. 7th edit. 2 Wms. Saund. 69 *c*, and Co. Mortg. 87. 95.

SECTION IX.

Crown Debts.

*Crown debts
of record.*

CROWN debts are either of record or not of record. The former bind the lands of the king's debtor from the time of his becoming such; and into whosoever hands the lands come the lien will attach. 2 Roll. Abr. 156 (b), pl. 1. The crown, by its prerogative, has preference in all cases in which its debt is prior on record to the judgment, statute, or recognizance of the subject, even if the lands have been actually delivered to the subject under *elegit* or extent. Bac. Abr. Exc. 735. 2 Saund. 70 *c*. Gilb. Exch. 88. If the judgment, statute, or recognizance of the subject be prior in date to the king's debt of record, the lands must be actually delivered to the subject in satisfaction of his debt, to entitle him to priority; for if the king's writ comes into the sheriff's hands, whilst the lands are in possession of the law on the *elegit* or extent, and not actually delivered to the creditor, the alteration of property will not be complete, and so the king's debt not postponed. Gilb. Exch. 91.

*Lien on lands
of accountants
and their
sureties.*

By the 13 Eliz. c. 4. it is enacted, that all the lands, tenements, and hereditaments, which any accountant of the queen, her heirs and successors, hath, while he remains accountable, shall, for the payment of the debts of the queen, her heirs and successors, be liable and put in execution in like manner, as if such accountant had stood bound by writing obligatory

[having the effect of the statute staple] to her majesty, her heirs and successors, for payment of the same. sec. 1. If the sum be not paid within six months after the account passed, the queen may sell so much of the debtor's estate as will answer the debt, the overplus of the sale to be returned to the accountant or his heirs, by the officer that receives the purchase-money, without further warrant. ss. 2 and 3. If such accountant or debtor purchase lands in others names, in trust for his own use, that being found by office or inquisition, those lands also shall be liable to satisfy the debt in such manner as before is expressed. s. 5. This act not to extend to charge any accountant, whose yearly receipts do not exceed 300*l*. otherwise than as he was lawfully chargeable before. s. 10. The queen, &c. being satisfied by sale of lands, the sureties are to be discharged for so much; but if any yet remains unpaid, the sureties are to pay the residue rateably according to their abilities. s. 15.—On this statute it has been held, that the lands of an accountant to the crown become bound from the time he enters into office, and not merely from the time he becomes indebted, so that sales by such receivers, before they become indebted, may be defeated by debts subsequently contracted. *Chan. of Oxford's Case*, 10 Co. 55, 56. *Bishop of Bristol v. Coxhead*, Mos. 257. *Nichols v. How*, 2 Vern. 389; et vide *Manning's Exch.* 536, 7.

Crown debts not of record, are those by simple contract, bond, or other specialty, which acquire no preference till found by inquisition, when they become debts of record. By the 50th and 53d sections of the act 33 Hen. 8. c. 39, the king is enabled to proceed to execution on a bond executed to him without a previous inquisition; and by the 74th section of the same statute, it is enacted, that if any suit shall be commenced or taken, or any process be awarded for the king, for the recovery of any of his debts, then the same suit or process shall be preferred before the suit of any person or persons: and that the king, his heirs and successors, shall have first execution against any defendant or defendants of and for his said debts, before any other person or persons, so always that the king's suit be taken and commenced or process awarded for the said debt at the king's suit, before judgment given for the

Crown debts not of record, entitled to priority over subject's execution, if property in goods not changed by sale and delivery.

said other person or persons. The words "and that the king shall have first execution," have been held to refer not to a preference as between two executions, the one sued out by the crown, and the other by the subject, but to a prerogative whereby the crown is to be first satisfied before the subject can take out any execution at all. Therefore, in *The King v. Allnutt*, the court of Exchequer decided that goods seized under a *fi. fa.* at the suit of a subject were, *before sale*, liable to be taken by virtue of the king's extent, *tested* after the delivery of the *fi. fa.* to the sheriff, 16 East, 278. *S. C.* 7 T. R. 174. And this case has been confirmed by the subsequent one of *The King v. Sloper*, 6 Price, 114, where it was held, that the crown's right on an immediate extent, in preference to the execution of a subject, can only be defeated by the property being altered by a sale and delivery of the goods seized under the latter, over-ruling the *quære* in 1 Gow N. P. C. 39. At all events, whatever doubt may be entertained of the authority of *The King v. Allnutt*, the court of Exchequer would not, so long as it remained uncontradicted by any later case, impeach it on a mere interlocutory motion. 6 Price, 114. There is no distinction between an extent in chief, and an extent in aid in this particular, *ibid.* Where in an action against the sheriff, it appeared that the *fi. fa.* had been in part executed by sale of some of the goods taken under it on Saturday, and the residue were sold on the Monday, *after* which, but before the payment over of the proceeds, the crown process was delivered to him; it was held, that by the sale the execution was complete, and the property thereby changed, and the party entitled to recover against the sheriff for money had and received. *Swain v. Morland*, 1 Brod. & Bing. 370. *S. C.* 1 Gow. Rep. 39. See also *Pugh v. Robinson*, 1 T. R. 116. *Thurston v. Mills*, 16 East, 254. *Dale v. Birch*, 3 Campb. 347, and *Burr v. Frutcher*, 1 Bing. 71, *infra*, 1085 b.

*Goods bound
from teste.*

As the crown is not bound by the statute of frauds, which directs that chattels shall be bound from the delivery of the writ of execution into the hands of the sheriff, the property of the king's debtor is bound from the day of the teste, although the writ be not delivered to the sheriff, or even sued out till long afterwards. *Man. Exch.* 544.

Extents in aid are now very properly confined to the amount of debt actually due to the crown, and not allowed, as formerly, to cover debts due to the king's debtors of larger amount than the debts due by them to the crown. 57 Geo. 3. c. 117. *Extent in aid.*

If an estate, subject to a mortgage, be sold absolutely under an extent, and the purchase-money paid into court, the crown will not be allowed, on motion, to satisfy the mortgagee, but the court will order a reference to the Deputy Remembrancer, to ascertain what is due on the mortgage. *King v. Combes*, 1 Price, 207. Notice of motion for an order of sale of a crown debtor's mortgaged lands under an extent, should be given to the mortgagee before the motion can be made, ib. *Extent on estate subject to mortgage.*

SECTION X.

Irish Lease and Loan.

THE mode in Ireland of granting a lease at the reduced rent, in consideration of the money borrowed, or of granting a lease, which is in fact, accompanied with a contract for borrowing and lending, has been before noticed, see ante, vol. i. 374, n. (e). In *Brown v. O'Dea*, 1 Sch. & Lef. 115, a beneficial lease granted at the same time as a loan of money by the lessee to the lessor was held fraudulent and void, since it afforded to the lender a profit on the money advanced beyond legal interest. It was attempted to distinguish these transactions, but Lord Redesdale said, that as nothing appeared in the case to separate them, they must be taken to be one and the same contract. He added, that it would perhaps have been a good rule to have held, that a lease of this nature should, in every case, be inoperative, for that it was to be presumed that whatever advantage the tenant obtained by the lease, was the inducement to him to lend the money, and that was obtaining a profit for the loan of money beyond what the law allowed, 1 Sch. & Lef. 119. In *Hunt v. Potter*, 1 Sch. & Lef. 119, n. (a), the evidence as to the lease and loan being one transaction, was contradictory. An issue was therefore directed to try "whether the plaintiff, at any time, and when, previous to the day on which the lease was executed, con- *Cases where lease connected with loan of money, held inoperative.*

tracted, and agreed with the defendant to grant the said defendant the lease in question, or whether such lease was wholly independent of and unconnected with the loan or treaty, or communication for a loan of money." So in *Drew v. Power*, *ibid.* 182, the Lord Chancellor was about to direct an issue to the same effect, but afterwards found the evidence before him sufficient to decide the case, and he declared that the lease having been obtained under the influence of a loan of money, expected to be obtained by the lessor from the lessee, the case was void. On this occasion Lord Redesdale further observed, that when the loan of money is an inducement to granting a lease, it vitiates the whole transaction; for the policy of the law would be completely defeated, if courts were not to watch such contracts with severity, and be sure that they did not permit persons, under cover of ordinary dealings between man and man, to obtain an advantage beyond the legal interest. If every man could obtain for the loan of his money as high a rate of interest, without hazard, as they who employed it in trade and manufactures, no man would employ his money in hazardous undertakings, the most industrious of the people would be ground down by usurers; who would get the profits of trade, and the enterprising and industrious trader would be ruined; 1 Sch. & Lef. 195. On these principles, a lease granted at the same time with the loan of money, by the lessee to the lessor, was in another case set aside, although the proposal for connecting the loan with the lease moved from the lessor; but a *bond fide* under-lease from the lender was permitted to stand. Where A. who was seised of the reversion in fee of premises which were let to E. for a term of years at 15*l.* 8*s.* yearly rent; agreed to sell to B. the rent reserved by that lease for the residue of the term for a certain sum, the principal and interest, of which was to be reimbursed to B. before the expiration of the term, by the perception of the rent, supposing it punctually paid; and, at the same time, A. being induced by the accommodation offered him by B., in purchasing the rent, made a lease for lives renewable for ever to B. of the same premises, and at the same rent which he paid, but the lease was not to commence nor the rent be payable until the expiration of E.'s lease; at which time the premises would be worth from 20 to 22*l.* *per annum*; it was held,

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that this was not impeachable as a lease coupled with a loan, the first transaction being a fair purchase of the rent, and the second, though induced by the first, was not distinguishable from a lease made upon payment of a fine. *Lewkey v. O'Donnell*, 2 Sch. & Lef. 466, and this decree was affirmed on appeal by Lord Chancellor Ponsonby, 2 Sch. & Lef. 742.

We now turn to *Webb v. Rorke*, 2 Sch. & Lef. 661, which Lord Manners declared he was not prepared to follow, see ante, vol. i. p. 374, n. (E). In *Wilton v. Browne*, 1 Ball & Bea. 125, a lease had been made at a stipulated rent, and the landlord at the same time obtained from the tenant a sum of money (two years rent) in which the tenant was secured by another lease of the same date for two years, at a nominal rent, the interest to be retained out of the first sale payable under the other lease. Lord Manners decided, that this was not a lease in consideration of a loan, as the relation of debtor and creditor did not exist; and that the tenant by action could not recover the money; it was but an advance of rent, by way of fine or foregift. His Lordship also held, that after great length of time the question of under-value could not be entertained, 1 Ball & Bea. 130. So a lease, which contained a clause, empowering the tenant to retain the rents till a sum of money advanced to the landlord at the time of granting the lease was repaid, but for which no separate security was given, was held by the same noble Lord not impeachable, on the grounds of being a lease connected with a loan. *Prior v. Dumphy*, 1 Ball & Bea. 27. And where there was a lease at a fair rent, the lessee paying two years rent in advance, the regular payment of which rent was secured by the lessor's bond and insurance on his life, Lord Manners held, that the lease was not impeachable, either as fraudulent on a power to lease without fine, or as being accompanied with a loan of money. His Lordship, on the latter point, observed, that in cases of forfeiture particularly, the court will always look into the real transaction between the parties; and he was satisfied, that in the case before him, the advance was never intended to be either a loan of money or a fine, but was a mere anticipation of rent, and such being the intention of the parties, if it did not operate to reduce the rent, he would not strain

Cases where lease remotely connected with loan, held good.

Latest general rule.

a point in order to work a forfeiture. And Lord Manners thought it not to be the duty of the court to extend the doctrine of lease and loan further than it had been already carried; for, it had too often been made the instrument of fraud and dishonesty by those who came, upon that ground, to be relieved against their own acts deliberately and fairly entered into; nevertheless, whenever the case of lease and loan was clearly established, the court would certainly grant relief. *O'Brien v. Grierson*, 2 Ball & Bea. 332.

Usury as connected with lease and loan.

In *The King v. Drury*, 2 Lev. 7, the defendant was indicted for usury in taking more than legal interest by obtaining a beneficial lease. Hale, C. J. before whom he was tried, said, that if any other security for payment of the money had been given, or that by any collateral agreement it was to be repaid, and all this a contrivance to avoid the statute, it would be usury. But a covenant to grant a new lease for a further term, at the same rent, and in consideration of a loan of money, was held by Sir Joseph Jekyll, M. R. to be such a lien as bound the right in whose hands soever it came. *Steed v. Cragh*, 9 Mod. 43. S. C. ante, 717, in the text.

Remainder-man cannot set aside lease by tenant for life on ground of loan.

On this subject it may be finally remarked, that a bill will not lie at the suit of a remainder-man to set aside a lease granted by a tenant for life, on the ground of its being accompanied with a loan of money; there being no privity between them, and the remedy being at law. *Corbet v. Seagrave*, 2 Ball & Bea. 98.

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SECTION XI.

Cases on Bankruptcy.

Mortgagee may pray sale under general order in bankruptcy.

IF the mortgagor become bankrupt, the mortgagee cannot prove under the commission, and then resort to his security for the residue. Lord Hardwicke has said, that "every creditor is to swear whether he has a security or not; if he has a security, and insists upon proving, he must deliver up the security for the benefit of the creditors at large, be they mortgages or pledges." *Grove, Ex parte*, 1 Atk. 104. *Twogood, Ex parte*, 19 Ves. 231. The usual course in this

case is, for the mortgagee to pray a sale of the estate under the general order in bankruptcy, (8th March, 1794,) and if the money produced thereby be insufficient to pay the expences of the sale, and his principal, interest, and costs, then to come in as a creditor under the commission. This order (which was made by Lord Loughborough, C.) directs, that upon application to the major part of the commissioners named in any commission of bankruptcy, by any person claiming to be a mortgagee of any part of the bankrupt's estate or effects, the said commissioners shall proceed to inquire, whether such person is such a mortgagee and for what consideration, and under what circumstances; and if the commissioners find such person to be a mortgagee, and no sufficient objection shall appear to his title or to the sum claimed by him, then that the commissioners do proceed to take an account of the principal, interest, and costs due upon such mortgage, and of the rents and profits of the mortgaged premises received by such mortgagee, or by any other person or persons, for his use; and that the commissioners do then cause due notice to be given in the *London Gazette*, and in such other of the public papers as they shall think fit, when and where the said mortgaged premises are to be sold before them, or by public auction at any other place or places, if they shall so think fit; that such sale be made accordingly; that all proper parties do join in the conveyance to the purchaser, as the said commissioners shall direct; that the monies to arise from such sale be applied, in the first place, in payment of the expences attending the same, and then in payment of what shall be found due to such mortgagee, for principal, interest, and costs; and that the surplus of the said monies (if any) be paid to the assignees of the said bankrupt: but in case the monies to arise from such sale be insufficient to pay what shall be found due to such mortgagee, then that such mortgagee be admitted a creditor under the said commission for such deficiency, but so as not to disturb any dividend then already made; and for the better making such inquiry, and taking such account as aforesaid, and making a title to such purchaser, it is lastly ordered, that all parties be examined by the said commissioners, upon interrogatories or otherwise, as the commissioners shall think fit, and do pro

duce before the said commissioners, upon oath, all deeds, papers, and writings in their respective custody or power, relating to the estate or effects of the said bankrupt, as the commissioners shall direct. 4 Bro. C. C. 550. 2 Cooke, B. L. 284. Whitmarsh, B. L. 478.

Cases on general order; et vide ante, 1060.

If the equity of redemption be not in the bankrupt the commissioners cannot, under this general order, direct a sale; *Topham, Ex parte*, 1 Madd. Rep. 38, nor can they compel a second mortgagee, not claiming under the commission but relying on his security, to join in a sale obtained by a first mortgagee. *Jackson, Ex parte*, 5 Ves. 357. 1 Madd. 38, n. The only way, therefore, to make a title in this case, is for the creditors to redeem both mortgages. 2 Christ. B. L. 110. But if the second mortgagee be present at the time the order for sale is made, and suffers the sale to go on, he cannot afterwards object to joining; per Lord Loughborough, in *Jackson, Ex parte*, supra. In *Wiseman v. Carbonnell*, 1 Eq. Ca. Abr. 312, pl. 9, the plaintiff had a mortgage and bond for the money lent, the equity of redemption was mortgaged again, and the second mortgagee had also a bond; the mortgagor became bankrupt, and the first mortgagee brought a bill to have the premises sold, and if they fell short (as they did) to come in as a creditor for the deficiency: it was so decreed, and the second mortgagee was directed to stand on his bond. This case, says Mr. Christian, has introduced the practice of allowing the mortgagee to prove for the deficiency upon a sale of the mortgaged premises, pledge, or lien, though there be no bond, note, or other security. 2 Christ. B. L. 108, 2d edit. If there be a first and second mortgage, the second mortgagee may petition the Chancellor that the premises may be sold; *Howell, Ex parte*, 7 Vin. Abr. 102; or he may apply to the commissioners for a sale under the general order, (2 Christ. B. L. 108,) and it may be questioned whether the latter is not now the only, as it certainly is the preferable, remedy open to him, besides a foreclosure. If the produce of the estate be insufficient to discharge the debt and costs, the mortgagee, proving for the remainder under the commission, cannot charge interest beyond the date of the commission. *Badger, Ex parte*, 4 Ves. 165: Upon an ap-

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plication to the Chancellor that the sale of the premises might be in the country, Lord Thurlow would give no directions therein, but left it to the commissioners to sell in the manner they thought most advantageous, *Comings, Ex parte*, 1 Ves. jun. 112. In cases where it is necessary for the mortgagee to apply to the court for leave to bid at a sale, or to become a purchaser, there must be the possibility of some conflicting interest, otherwise the application will be unnecessary. *Ducane, Ex parte*, 1 Buck. B. C. 18. But in a subsequent case Mr. Preston, as *amicus curiæ*, stated the general understanding of the profession to be, that it was necessary in every instance for the mortgagee to apply to the court for liberty to bid at the sale. And the court seems to have acquiesced in that suggestion. *Hammond, Ex parte*, ib. 464. It is difficult, however, to draw such a general rule from the decided cases; (see them collected, ante, vol. i. 124, *in notis*;) nevertheless it would not be imprudent to neglect obtaining an order for such purpose.

When requisite to apply to court to bid at sale.

And it is observable, that in the case of bankruptcy, the mortgagee with powers of sale may waive the special power conferred on him by the deed, and apply to the court for a sale in his general character of mortgagee, in which case the Vice Chancellor said the petitioner might bid, if the sale was before the commissioners, and conducted by the assignees, but that he never would allow the assignees to bid in their private character without very special circumstances. *Hodgson, Ex parte*, 1 Glyn & Jam. 14. Where the mortgagor in possession was by express contract tenant at will to the mortgagee, it was held, that the mortgagee was not entitled to the crops upon the mortgaged premises at the time of the bankruptcy of the mortgagor, or at the time of the order for sale by the commissioners. *Temple, Ex parte*, 1 Glyn & Jam. 216. That biddings upon sales of bankrupt's property before commissioners of bankrupt, will be opened in analogy to sales under a decree, see *Ex parte Partington*, 1 Ball & Bea. 209, and *Ex parte Green*, 1 Atk. 202; et vide *Gould, Ex parte*, 1 Glyn. & Jam. 231, where a purchaser of a bankrupt's mortgaged estate sold before the commissioners under the general order, was, upon petition in the bankruptcy, ordered to com-

Mortgage with powers of sale.

plete his purchase; and note, that the commissioners have jurisdiction under the general order of March, 1794, to take an account of the expences attending the sale of the mortgaged premises, and to tax the costs of all parties attending the sale, without any special application to the court for an order for that purpose. *Mathew, Ex parte*, 1 Glyn & Jam. 342.

Auction duty.

By the statute 43 Geo. 3. c. 69, schedule A. (Excise consolidation act) a duty of sixpence in the pound is imposed on sales by auction. But the 15th section (19 Geo. 3. c. 56) provides, that nothing in this or the recited act shall extend to charge with the said duty any estate or effects of bankrupts, sold by order of the assignee or assignees under any commission of bankruptcy. Lord Kenyon has held at nisi prius, that sales under the above general order are subject to the auction duty, notwithstanding the exceptions in this statute, because the property sold is in fact the property of the mortgagee, and not of the bankrupt. *Coare v. Creed*, 1 Esp. 699. Mr. Christian adds, "I should scarce think this opinion would be adopted by other judges; for the mortgagee is to receive his debt free from all costs." 2 Christ. B. L. 111. It has however been followed in *King v. Abbott*, 3 Price, 178, with this distinction, that if the assignees take upon themselves to sell, not merely the equity of redemption to which only they are entitled, but the whole property absolutely, they will be liable for the duty, because they cannot state in their certificate that *all* and every the estates, goods, &c. specified in the catalogue, were really and truly the property of the bankrupt at the time of suing forth the commission. Baron Graham said, that it was a frequent practice to direct a sale of an equity of redemption alone, and that was what the assignees should have done. It was not important whether the mortgagee's assent were expressed or implied. The assignees chose to sell the whole, and might have pledged themselves to make a title to the purchaser; and if, in doing so, they took upon themselves to sell the property unincumbered, for their greater advantage, they must do it with all its consequences. In the case of pledges of personal goods, the property was substantially in those who had the rightful possession. In this instance the learned Baron was clearly of opinion, that the assignees had made

themselves liable to pay the duty. And per Richards, Baron, if the mortgagee had sold his mortgage by auction, he would have become liable to pay the duty, *although the sale had not proved sufficiently productive to satisfy his debt.* 3 Price, 197. After a review of this case, Mr. Christian is still obliged to think, that the composers and enactors of the statute 19 Geo. 3. meant to include by the general words "estate, effects, goods, chattels, and property of the bankrupt," all that interest in the bankrupt which must be sold by order of the Chancellor, or the commissioners, for the benefit of the creditors; and the learned professor suggests, that if the legislature, in this instance, have not expressed themselves with sufficient clearness, the omission ought to be supplied by the first statute passed upon the bankrupt law. 2 Christ. B. L. 587, 8.

A mortgagee having once elected to prove, under the commission, as a creditor, cannot afterwards retract, and betake himself to his security. *Downes, Ex parte*, 18 Ves. 290. On this principle it should seem to follow, that a mortgagee coming in under a composition deed, would not be allowed to retract the election he has made, but as the intention of these deeds is to prevent the suing out a commission of bankrupt, (in order to effectuate which, it is necessary that all the creditors should join, *Bamford v. Baron*, 2 T. R. 594, n.) it has become usual to insert in all deeds making provision for debts, an express declaration, that creditors holding a special security shall not be prejudiced by concurring in the general arrangement.

Mortgagee cannot retract election to prove.

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A mortgagee who takes a security from two persons, one as principal, and the other as surety, need not give up his joint security upon the bankruptcy of the principal, for he may come in as a general creditor; and if that is insufficient to pay him his whole debt, he may afterwards resort to the surety under his joint security. 2 Atk. 527. *Wildman, Ex parte*, 1 Atk. 109. *Parr, Ex parte*, 1 Rose, 76. So where a bankrupt, previous to the commission against him, procured persons to assign an interest in copyhold premises as a security to a creditor of his, it was held, that the creditor might prove under the commission, without delivering up such security. *Goodman, Ex parte*, 3 Madd. 373. But the court would not

Not bound to give up joint security.

order a sale of premises for more than the mortgage debt, or pay a debt due on the bankrupt's recognizance, in aid of his sureties, where the recognizance was of a private nature. *Usher, Ex parte*, 1 Ball & Bea. 197.

Having bond may prove, and fix deficiency, to vote for assignees. Sed qu.

If a mortgagor becomes bankrupt before the time appointed for re-payment of the principal money, yet if the mortgagee has a bond for the same debt, and default has been made in one payment of the interest contrary to the express terms of the condition, the mortgagee may prove for the principal sum and the interest then due as a present debt; for one default makes him a legal creditor for the whole penalty. *Fisher, Ex parte*, 3 Madd. 159. S. C. 1 Buck. 188. In *Nunn, Ex parte*, 1 Rose, 322, it was held, that where a creditor has a mortgage, which is sure to be deficient, he may fix a limit, and prove the remainder, in order to vote in the choice of assignees. Et vide S. L. *De Tasset, Ex parte*, ib. 324. But in a subsequent case, Lord Eldon said, the great seal would very cautiously relax the practice which required a security to be sold before a proof could be admitted, by ordering it to be taken at a valuation; and held, that an application for that purpose must depend upon its special circumstances, of which the general benefit of the creditors, and the amount of the applicant's debt, were very material; and in the case before him, which was the case of a pledge and deposit, he saw nothing to exempt it from the general practice. *Smith, Ex parte*, 2 Rose, 63. This decision seems founded on a reasonable ground; for how can the creditor, on proof of his debt, swear that he has no security for the same. In a case where the acceptors of a bill became bankrupts, and the holders took a mortgage from the drawers, Lord Eldon determined that they might prove against the acceptors without deducting their security; for that the deduction of a security was never to be made but when it was the property of the bankrupt. *Parr, Ex parte*, 1 Rose, 76.

Of rent.

If a mortgagee gives notice to the tenant in possession to pay the rent to him, and he pays it to the assignees of the mortgagor, the Chancellor will not order them to refund the rent to the mortgagee; for if the mortgagor receives the rents, no court will compel him to pay them over to the mortgagee.

Wilson, Ex parte, 1 Rose, 444. S. C. 2 Ves. & Bea. 252. A mortgagee of a bankrupt's estate, though he pays the arrears of rent that are due to the bankrupt's landlord, unless he applies to the court for an order that he may stand in the place of the landlord, in consideration of his paying the arrears of rent, shall not be preferred to the creditors under the commission. *Anon.* 1 Atk. 102. But Mr. Cooke observes, that it rather seems no such order could be obtained, because unless the landlord actually distrains, he has himself no lien on the goods. Cooke's B. L. 185.

A conveyance by a trader of all his estate and effects, by way of mortgage, though for securing a sum of money not one-sixth of the value of the property, is an act of bankruptcy, and will make the mortgage void. *Hassel v. Simpson*, 1 Bro. C. C. 99. *Devon v. Watts*, 1 Dougl. 87, 89. Cooke's B. L. 99, 7th edit. So a security given by a debtor, who is a trader within the bankrupt laws, in order to give a particular creditor an undue preference in the payment of his debt, and in contemplation of an act of bankruptcy, is fraudulent as against the general creditors, and therefore void. *Linton v. Bartlett*, 3 Serjt. Wils. 47. But where a trader by settlement on his marriage, in consideration of 1000*l.* (his wife's fortune) conveyed a particular house, held for a term of years to trustees, upon trust, to permit him (the trader) to receive the rents and profits until his death, or until he should happen to fail in his credit or circumstances, or become a bankrupt, whichever should first happen; and in case any of the above events should take place during the life of his intended wife, that the trustee should, immediately after, raise by sale or mortgage 1000*l.*, and should pay it to the intended wife, the same not to be liable to his debts and engagements; and afterwards the settlor became bankrupt, this was held to be a fair and valid settlement in nature of a mortgage to secure the wife's fortune, and an injunction to restrain the trustees from recovering the house at law, was refused. Lord Eldon, however, observed, that a trader could not, on his marriage, settle his property in such a manner that in the event of his bankruptcy his wife should be entitled to a provision out of it, in prejudice to his creditors; and if such were the case before the court, his

Mortgage of all trader's effects, act of bankruptcy, and voidable. Contra of settlement, which secures to wife her fortune on death or bankruptcy of her husband.

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Lordship would have had no hesitation in granting the injunction. But though the property in the case before him, strictly speaking, was the husband's, yet in reality it was the fortune of the wife, intended as a provision for her and her children in case of the bankruptcy of her husband, and advanced to him on condition that the wife should have it again on that particular event, he giving a security for it on his own property, in nature of a mortgage. That event having happened, the wife became a creditor on this particular fund, and was entitled to have the benefit of her special lien on this property. *Higginson v. Kelly*, 1 Rose, 368. Et vide *Meaghan, Ex parte*, 1 Sch. & Lef. 179. *Hinton, Ex parte*, 14 Ves. 598; and *Lockyer v. Savage*, 2 Str. 947.

Mortgagee may petition to stay certificate.

A mortgagee may petition to stay the bankrupt's certificate. In the case supporting this position, the mortgagee made no application to the commissioners until the third meeting, which induced the Vice-Chancellor to dismiss his petition. The mortgagee appealed, and the Lord Chancellor directed that search should be made at the bankrupt office for precedents; which was accordingly done, and the following precedents produced confirmatory of the doctrine above stated: *Rigge, Ex parte*, in *re Perry*, 20th March, 1780. *Horn, Ex parte*, in *re Sidebottom*, 20th July, 1782. *Hurford, Ex parte*, in *re Kekwick*, 10th April, 1784. But as the probable amount of the mortgagee's debt was disputed, the Lord Chancellor would not make the order for staying the certificate, but directed it to be deposited in the bankrupt office, subject to his further order thereon. *Whitechurch, Ex parte*, 1 Glyn & Jam. 73. S. C. 2 Jac. & Walk. 518. Et vide *Ramsbottom, Ex parte*, 2 Christ. B. L. 709. Where a bankrupt, who had obtained his certificate, being possessed of leasehold premises as executor and residuary legatee, mortgaged them to secure a debt of his own, and afterwards assigned the equity of redemption for valuable consideration, the deed reciting that the assignment was made for the purpose of paying the debts of the testatrix, and the assignee procured an assignment of the mortgage, it determined that the assignees under the bankruptcy had no right against the assignee for valuable consideration, though they proved in an action that the bankrupt's

certificate was fraudulently obtained. *Bedford v. Woodham*, 4 Ves. 40, n.

A few cases on the statute 21 Jac. 1. c. 19. ss. 10 & 11. *Reputed ownership. Stat. of Jac. 1.* (which have been previously treated of, ante, vol. i. p. 41, et seq. and 48, ib. n. (H)) remain to be noticed. Where stock standing in the Accountant-General's name was mortgaged to secure a debt, and the Accountant-General transferred it to the mortgagor without the privity of the mortgagee, and the mortgagor afterwards became bankrupt, it was held, that the stock did not belong to the assignees; for that when the mortgage was made, the stock was not in the possession, order, and disposition of the bankrupt, and though it was so after the time of the bankruptcy, yet it did not appear that it was with the consent and permission of the true owner, and the mortgagee was the true owner, the sum lent being more than the value of the stock. *Richardson, Ex parte*, 1 Buck, 480. Where there was a mortgage of a ship in the port of Dublin, and a delivery of the muniments, and the mortgagee insured her there, and made a second mortgage; and the second mortgagee took possession as soon as he was informed she was in an English port, this was held a sufficient possession to take the case out of the statute. *Batson, Ex parte*, 3 Bro. C. C. 362. But where a merchant pledged for value the bills of lading of an expected cargo; and his agents, who were part owners, without the knowledge of the owner or the pawnee, disposed of part of the cargo abroad; after which the owner became bankrupt, and he induced the agents to replace the goods disposed of, by others, of which the agents gave him bills of lading, and he sent them to the pawnees to make good their securities, it was held, that the assignees of the bankrupt might recover the substituted goods against the pawnees. *Meyer v. Sharpe*, 5 Taunt. 74. So goods in a bonded warehouse after sale, though marked with the initials of the vendee, have been held to remain in the power, order, and disposition of the vendor, and to pass to his assignees in bankruptcy. *Knowles v. Horsfall*, 5 Barn. & Ald. 134. And it has very recently been decided, that under a commission of bankruptcy against two partners, ships registered in the name of one of

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them, but in the ordering and disposition of both, form part of the joint estate. *Burn, Ex parte*, 1 Jac. & Walk. 378.

Extent.
Preference.
Relation.
Et vide ante,
1078.

Generally speaking, the enrolment of a bargain and sale under the 27 Hen. 8. c. 16, relates to the time of its execution, so as to avoid all mesne acts of the bargainor; yet such relation does not take place on the bargain and sale by commissioners of bankruptcy of the debtor's real estate, and therefore the execution of the crown, if tested before the enrolment, will find the property still vested in the bankrupt, and consequently liable to the extent. *Perry v. Bowers*, Sir T. Jones, 196. S. C. 1 Vent. 360. 2 Show. 156. *Elliott v. Danby*, 12 Mod. 3. *Doe v. Mitchell*, 2 Maul. & S. 446. Man. Exch. 540. And it is observable, that the assignment of the commissioners of bankrupt, as against the king, will not relate to the time of the bankruptcy, as it will between subject and subject. *Queen v. Arnold*, 7 Vin. Abr. 104. *Attorney-General v. Handbury*, 2 Show. 481, cited *Attorney-General v. Capell*, ib. 480. *Brassey v. Dawson*, 2 Str. 978. Man. Exch. 540. But if the extent be tested on a day subsequently to the assignment, even to a provisional assignee, it will come too late (*Drury v. Mann*, 1 Atk. 95; et vide 14 Ves. 87); and it is said the crown cannot prove its debt under the commission. 2 Str. 752. Man. Exch. 545. The subject of precedency in these cases has lately undergone very considerable discussion in the Exchequer, on a case where the sheriff had seized the goods, &c. of a defendant under a *fieri facias* sued out on a judgment recovered at the suit of a subject creditor, and *after* the seizure made, but *before* sale made of the goods by the sheriff, a writ of extent in aid issued, tested after the seizure; it was holden by the Lord Chief Baron, and Barons Graham and Garrôw, that the extent attached upon the goods so taken whilst remaining unsold in the sheriff's hands; Baron Wood being of a different opinion, for that as the writ of *fieri facias* had been in fact and by law *executed* by the seizure, the crown process coming to the sheriff after he had seized, was too late, because the property was altered and divested out of the debtor on the seizure by the sheriff, which is the perfecting of the execution, the subsequent sale being a merely formal part of the sheriff's duty; but it was made a *quære*, in what stage of the execution

the property in the debtor's goods is divested out of the debtor, and transferred to the judgment creditor? Or when an execution may be considered as having been executed? *Rex v. Giles*, 8 Price, 293. The learned reporter has treated the subject at some length in a note to this case, *ibid.* 374, wherein he has collected the previous decisions and dicta, and advanced many useful observations on the doctrine in general; *et vide* Man. Exch. 543; and *Swain v. Morland*, 1 Brod. & Bing. 370; *ante*, 1078 a.

By the new Bankrupt Act it is enacted, that if any bankrupt shall have granted, conveyed, assured, or pledged any real or personal estate, or deposited any deeds, such grant, conveyance, assurance, pledge or deposit being upon condition or power of redemption at a future day, by payment of money or otherwise, the assignees may, before the time of the performance of such condition, make tender or payment of money, or other performance, according to such condition, as fully as the bankrupt might have done, and after such tender, payment, or performance, may sell and dispose of such real or personal estate for the benefit of the creditors as aforesaid. 6 Geo. 4. c. 16. s. 70. And that if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission: *Provided, that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of an act of parliament made in the fourth year of his present majesty, intituled, "An act for the registering of vessels,"* 5 Geo. 4. c. 98. s. 72. Also, that if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration), have conveyed, assigned, or transferred to any of his children, or any other person, any

Real or personal estate of bankrupt, or deeds, pledged, redeemable by assignees before day agreed for redemption.

Goods in the possession, order, or disposition of the bankrupt, may be assigned by the commissioners.

Proviso for assignments of vessels under 5 Geo. 4. c. 98.

Where bankrupt shall voluntarily convey his lands, goods, &c. commissioners may sell the same.

hereditaments, offices, fees, annuities, leases, goods, or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person or persons, or into any other person's name, the commissioners shall have power to sell and dispose of the same as aforesaid; and every such sale shall be valid against the bankrupt, and such children and persons as aforesaid, and against all persons claiming under him, *ibid.*

Conveyances two months before the commission, valid.

sec. 73. It is further enacted, that all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt, *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, *bonâ fide* executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed: *Provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission, within two calendar months next after it shall have been superseded, no such conveyance, contract, dealing, or transaction, execution, or attachment, shall be valid, unless made, entered into, executed, or levied more than two calendar months before the issuing the first commission, ibid. sec. 81.*

Superseded within two months.

Bonâ fide payments made by and to bankrupt, without notice, valid.

Also, that all payments really and *bonâ fide* made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bonâ fide* made, or which shall hereafter be made to any bankrupt before the date and

issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed, *ibid.* sec. 82. Also, that the issuing of a commission shall be deemed notice of a prior act of bankruptcy (if an act of bankruptcy had been actually committed before the issuing the commission), *if the adjudication of the person or persons against whom such commission has issued shall have been notified in the London Gazette, and the person or persons to be affected by such notice may reasonably be presumed to have seen the same*, *ibid.* sec. 83. Also, that no person, or body corporate, or public company, having in his or their possession or custody any money, goods, wares, merchandizes, or effects belonging to any bankrupt, shall be endangered by reason of the payment or delivery thereof to the bankrupt or his order; provided such person or company had not, at the time of such delivery or payment, notice that such bankrupt had committed an act of bankruptcy, *ib.* sec. 84. And that no purchase from any bankrupt *bond fide* and for valuable consideration, *where the purchaser had notice at the time of such purchase, of an act of bankruptcy by such bankrupt committed*, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within *twelve calendar months* after such act of bankruptcy, *ib.* sec. 86. And that no title to any real or personal estate sold under any commission, or under any order in bankruptcy, shall be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the suing out of the commission, or in any of the proceedings under the same, unless the bankrupt shall have commenced proceedings to supersede the said commission, and duly prosecuted the same, within *twelve calendar months* from the issuing thereof, *ibid.* sec. 87.

What shall be notice by construction.

Persons not to be endangered for delivery of goods without notice of act of bankruptcy.

Bond fide purchases from bankrupts not to be impeached.

Titles not to be impeached unless superseded as commenced within twelve months.

SECTION XII.

*When Ejectment to be used.**Ejectment.*

THE remedy by ejectment is more particularly adapted to the enforcement of that part of the mortgage transaction respecting the punctual and regular payment of interest, than to the redemption of the security. The remedies of the mortgagee are said to be fourfold, ante, p. 966, n. When the interest becomes in arrear, the first step is to procure a perception of the rents; in other words, to take possession of the property mortgaged. If the tenants in possession hold under leases made before the mortgage, then the mortgagee cannot eject them, but he may give them notice of his mortgage and distrain for the rents which accrue afterwards, or which may then be in arrear if the arrearage accrued for a time subsequent to the date of the mortgage. After notice of the mortgage, the tenant cannot safely pay any rent to the mortgagor. If the lease be made after the mortgage, or if the mortgagor be himself in possession, the usual course is to proceed by ejectment, but this is only necessary where the mortgagor is in possession and refuses to attorn, for as to the lessee, if he will pay his rent to the mortgagee on notice of the mortgage, there seems to be no necessity of putting the estate to the expence of an ejectment; but this subject has been discussed before, to which therefore it is merely necessary to refer, see ante, vol. i. p. 173, n.

In reference to the action of ejectment, it is observable, that if the defendant prove a title out of the lessor, it will be sufficient, though he have no title in himself; but he ought to prove a subsisting title out of the lessor. Thus if he produce an ancient lease for 1000 years, it will not be sufficient, unless he likewise prove possession under such lease within twenty years. Bull. N. P. 110. But in an action brought by a second mortgagee against the mortgagor, the latter was not allowed to give in evidence the title of the first mortgagee in bar of the second, he being estopped from averring (contrary to his own act) that he had nothing in the land when he took upon himself to convey by the second mortgage. *Lindsey v.*

Lindsey, Bull. N.P. 110 a. So a person accepting a mortgage will be prevented from questioning the title of the mortgagor. Therefore, in ejectment, where the defence set up was, that the mortgagor claimed under a lease from the crown for a term which, by the 1 Ann. st. 2. c. 7, was void, it was not allowed. *Doe v. Abrahams*, 1 Stark. 305; and see *Blake v. Foster*, 8 T. R. 487. *Wood v. Day*, 1 J. B. Moore, 389. And the same principle, it seems, will extend to the assignee of a mortgagee; *Barwick v. Thompson*, 7 T. R. 488, where it was expressly held, that if B. claiming under A. let lands for a year to C. and die, and A. afterwards brings an ejectment against C., C. cannot dispute the title of A. In *Cordinglee v. England*, 3 Keb. 712, ante, vol. i. p. 112, it was held, with an *adjournatur*, that a mortgagee is not estopped from averring, that the mortgagor had no estate in the land; sed vide the note (Q) there, and *Parker v. Manning*, 7 T. R. 537.

If the defendant in ejectment produce a mortgage deed, where the interest has not been paid, and the mortgagee has not entered, it will not be sufficient to defeat the lessor who claims under the mortgagor, because it will be presumed, that the money was paid at the day, and consequently that it is no subsisting title; but if the defendant prove interest to have been paid upon such mortgage after the time of redemption, and within twenty years, it will nonsuit the plaintiff, per Holt, C. J. in *Wilson v. Witherby*, Bull. N. P. 110 a. Where there is a mortgage term outstanding, it will be a bar to a recovery in ejectment at law, even between heir and devisee claiming subject to the charge. The only remedy therefore in such a case is in a court of equity. *Barnes v. Crow*, 4 Bro. C. C. 2. S. C. 1 Ves. jun. 486. In *Farmer v. Rogers*, 2 Serjeant Wils. 26, the defendant produced a mortgage for years by deed from the plaintiff's ancestor, upon which was an indorsement *in hæc verba*, "Received of Mrs. M. O. 500*l.* on the within recited mortgage, and all interest due to this day; and I do hereby release to the said M. O. and discharge the mortgaged premises from the said term of 500 years." On a case reserved, the court held, 1st. That these words amounted to a surrender of the term. 2d. That such surrender might be by note in writing by the statute of frauds; and 3d. That

Dry mortgage no bar to ejectment, when.

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a note in writing was not required to be stamped. But though a surrender or an assignment of a term may be made by note in writing without stamp, yet if it be made by deed under seal, it must be stamped; *Goodright v. Gregory*, Loft, 339; et vide *Doe*, dem. *Batten v. Murless*, 6 Maul. & Selw. 110. And by the present stamp act, a stamp is required in the former case. It is also observable, that after judgment in ejectment, the sheriff may deliver possession, although the defendant be dead, provided he dies after and not before the writ of possession is taken out. O. Bridg. 468.

Statute empowering landlords to enter without ejectment; saves interest of mortgagees of lease.

By the 4 Geo. 2. c. 28. s. 2, it is enacted, that every landlord who, by his lease, hath a right of re-entry, in case of non-payment of rent when half a-year's rent is due, and no sufficient distress is to be had, may recover without any previous demand of rent; and a recovery so had shall be binding on all parties; but it is expressly provided, that the act shall not extend to bar the right of mortgagees of the lease who are not in possession, so as such mortgagees do, within six calendar months after judgment had, and execution executed, pay all arrears of rent, and all costs sustained by the lessor, and perform all the covenants which are reserved to be performed on the part of the lessee. On this statute it has been held, that the mortgagee of a lease has the same title to relief against an ejectment for non-payment of rent, and upon the same terms, as the lessee against whom the recovery is had. Where therefore the mortgagor distrained under this statute, and took possession, and afterwards re-demised for another term of fourteen years, and the second lessee entered and expended the money in improvements, on an affidavit of C. (the mortgagee of the first lessee), that he knew nothing of the ejectment till after the writ of possession was executed, the court of Common Pleas made a rule *nisi* absolute, which on a former day it had granted, that upon payment by the mortgagee, to the lessor, of the rent in arrear, and costs of the ejectment and of the then application, the mortgagee should have the premises given up to him. *Doe*, d. *Whitfield v. Roe*, 3 Taunt. 402, et vide ante, 982.

Same in Ireland.

By the 8 Geo. 1. c. 2. s. 4. (Irish stat.) it is enacted, that when any lease, for the avoiding of which an ejectment for

non-payment of rent shall be brought, which lease, before the ejectment brought shall have been mortgaged, and the lessee and mortgagee, and their respective assignees, shall be duly served with a summons in the said ejectment, and the proper affidavit of the said summons shall be made and duly filed, and the plaintiff shall obtain judgment and execution in the said ejectment, then if the said mortgagee, or his assignee, shall not, within nine months after such execution executed, pay or tender unto the said landlord or lessor, the said rent in arrear, and costs, to be ascertained in the manner therein mentioned, such mortgagee, or his assignee, shall be barred of all relief and remedy at law or equity on account of the said mortgage. By the fifth section it is provided, that where the mortgagee, or his assignee, shall not have registered his mortgage within six calendar months after its perfection, the landlord may proceed in ejectment and obtain judgment and execution thereon, although such mortgagee, or his assignee, be not served with the above summons, in such manner as if the mortgagee, or assignee, had been duly served. But it has been held, that a mortgagee, or his assignee, will be entitled to a summons if notice of the mortgage or assignment can be proved on the lessor, although the mortgage assurance may not have been registered according to the act. *Biddulph v. St. John*, 2 Sch. & Lef. 532, et vide ante, vol. i. 196, *in notis*. It has also been held, on this statute, that though six months may have elapsed since the execution of an ejectment for non-payment of rent, a mortgagee of the tenant's interest, upon payment of the writ in arrear and costs to the landlord before the expiration of nine months after the execution, will be entitled to be put into possession. *Barnard v. Brownrigge*, 1 Vern. & Scriv. 258.

Where the proposed security is a lease which contains a condition that on non-payment of rent the lease shall cease and be void, as distinguished from a lease which contains a proviso for re-entry in the like case, the mortgagee should take immediate possession, so as to be enabled, out of the profits, to pay the rent regularly, and retain the surplus for his interest, &c. A tenant to the mortgagor, who does not give him notice of an ejectment brought by the mortgagee,

Mortgagee of lease should enter.

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Tenant should give notice of claims.

Tolls.

Ejectment a spur.

is not liable to the penalties of the 11 Geo. 2. c. 19. s. 12. (i. e. three years improved rent for secreting ejectments), because, as was observed by the court, that the act extends only to cases where ejectments are brought which are inconsistent with the landlord's title. *Buckley v. Buckley*, 1 T. R. 647. Ejectment for toll-houses, &c. lies by the mortgagee of a proportion of the tolls mortgaged, for an advance thereon, though the act directs that the different mortgagees shall be creditors in equal degree. *Doe v. Booth*, 2 Bos. & Pul. 219, et infra, vol. iii. tit. *Mortgage of Tolls*. It is merely necessary to subjoin the following observations of Lord Erskine, in *Radcliffe v. Warrington*, 12 Ves. 334. "The case of a mortgage turns upon circumstances peculiar to it. The single object of the transaction in its original construction is to create a security for money. The court, by permitting redemption, does not dispense with any thing for which either party contracted, but gives effect to the original object of both. So, the covenant for payment of rent is inserted, in order to give security to a party demising his estate for a term. He brings an ejectment, which is used as a spur, and the true object of the contract is obtained, either under the statute 4 Geo. 2. c. 28.; or, if the case is not within the statute, this court gives relief in cases that appear fit for it."

SECTION XIII.

Of the Doctrine of Election.

Statement of doctrine, as it applies to mortgages.

THE question of election cannot affect the mortgagee, for, as between him and the mortgagor, the very act of making the mortgage is an exertion of ownership which demonstrates the mortgagor's election to take the thing pledged, but it does not conclude him with reference to other persons. Where a party, bound to elect between two funds, having mortgaged one, elects to take the other, the former must be taken subject to the mortgage, but shall be reimbursed by the latter; as where an heir at law, who was bound to elect whether he would take a copyhold estate not surrendered to the use of the will, or an annuity bequeathed to him by the will, he having, under the supposition that he was entitled to both, procured himself to

be admitted to the copyhold estate, and mortgaged the same for 700*l*.—in such case, where he elected to take the annuity in preference to the estate, it was held, that the devisee taking the estate, must take it subject to the mortgage, but that he was entitled to apply to the court for satisfaction out of the annuity to the extent of the mortgage. *Rumbold v. Rumbold*, 3 Ves. 65. So, where a testator having a debt secured on lands, gave the mortgage money to the mortgagor, and desired him to give a reversionary interest therein to a third person for life, and the mortgagor sold the estate, it was determined, that he should bring the mortgage money into court, for the use of the devisee, subject to the life estate. *Lewis v. King*, 2 Bro. C. C. 600. If a man has subjected his estate to special limitations or incumbrances, and by his will makes a new disposition of his property, discharged of the incumbrances, or other different limitations, if the incumbrancers derive other interests under the will, they must not disappoint it, but must permit the estate to go in the new channel, and as free from incumbrances as the testator intended. If therefore a mortgagor bequeaths to his mortgagee a legacy or any other benefit, and devises away the estate in mortgage, free from all incumbrances, in express words, or it can be collected by a fair interpretation, that the testator intended the estate to go to the devisee discharged of the mortgage and free from incumbrances, the mortgagee, if he takes the legacy, must release his incumbrance. *Blake v. Bunbury*, 1 Ves. jun. 523. But general words are not alone sufficient to pass an estate free from incumbrances. *Ibid.* et vide further, *French v. Davis*, 2 Ves. jun. 581; and generally, 1 Swan. Rep. 381, *in notis*.

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SECTION XIV.

Of the Merger of Charges.

A PERSON, having a mortgage or equitable lien on an estate for the payment of a sum of money, and afterwards becoming entitled to the estate itself, either for life or in tail, is not, by the mere accession of the estate for life, or in tail, deprived of the benefit of his mortgage or lien; for he has a partial interest in the estate, and an absolute right to the mo-

*General rule
as to merger
of charges.*

ney; and there is no ground in equity to exonerate the estate in favor of the persons in remainder, or of the issue in tail, to the prejudice of the personal representatives of the tenant for life, or in tail. *Duke of Chandos v. Talbot*, 2 P.Wms. 604. 15 Vin. Ab. 369, pl. 4. *Wyndham v. Egremont*, Amb. 758. But where a person is absolutely entitled to a sum of money charged on an estate, and afterwards becomes entitled to the fee-simple thereof, the court of Chancery, in most cases, consolidates the rights by extinguishing the mortgage or equitable lien. Thus, where A. devised certain premises (subject to a mortgage of 3500*l.*) to his three daughters, to be divided equally; one died, and the mortgagee bequeathed to the two survivors all the money due on the mortgage and the interest, so that it did not altogether exceed 4000*l.*, and if it did not amount to 4000*l.*, then to be made up; and the other daughter died leaving all her real and personal estate to her surviving sister, it was decided that the charge merged in the inheritance. *Price v. Gibson*, 2 Eden, 115. This rule, however, has two exceptions; the first in favor of creditors, (*Norfolk v. Gifford*, 2 Vern. 208. *Compton v. Oxendon*, 2 Ves. jun. 261;) and the second in favor of infants, where a person, becoming entitled to the charge and the estate, dies during his minority, having by will disposed of the charge. *Chester v. Wiles*, Amb. 246. *Powel v. Morgan*, 2 Vern. 90. *Thomas v. Keymiss*, 2 Vern. 348. *Donisthorp v. Porter*, 2 Eden, 162. S. C. Amb. 600. Even in the case of infancy, it seems necessary, in order to keep the charge on foot, that the infant should manifest an intention that the charge should not merge. See *Powel v. Morgan*, *Thomas v. Keymiss*, and *Chester v. Willis*, supra. When a man marries an infant, who is entitled to the fee-simple of an estate as also to a sum of money charged on the same in the event of her marriage, it should seem, that the charge will not merge to the prejudice of the husband. *Stevens v. Bateman*, 1 Bro. C. C. 22. In the case of lunacy, there is no equity in favor of the personal representatives of the lunatic against the heir, to have a charge of this kind raised. *Compton v. Oxendon*, supra.

Latest general rule is, not to merge charge if The doctrine under consideration has been further explained by the late case of *Forbes v. Moffatt*, 18 Ves. 384, by

which it appears that a mere entry on the land, or an act which savors of ownership, will not be sufficient to shew that the party meant the charge to merge. The question, in the absence of an express declaration, will be, whether it be more for his benefit that the charge should merge than that it should subsist. As for example, if there are subsequent incumbrancers whose liens would acquire priority by a merger of the previous charge, it will be thence inferred, that the owner could not intend to divest himself of his priority over the subsequent incumbrancers, and therefore that the charge shall subsist, separate from the estate, for his benefit. Sir William Grant's words on this, are, "It is very clear that a person becoming entitled to an estate subject to a charge for his own benefit, may, if he choose, at once take the estate, and keep up the charge. Upon this subject, a court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished, where it would subsist at law, and sometimes preserve it, where at law it would be merged. The question is, upon the intention, actual or presumed, of the person in whom the interests are united. In most instances it is, with reference to the party himself, of no sort of use to have a charge on his own estate, and where that is the case, it will be held to sink, unless something shall have been done to keep it on foot. But the owner of a charge is not, as a condition of keeping it up, called upon to repudiate the estate. The election he has to make is, not whether he will take the estate or the charge, but whether, taking the estate, he means the charge to sink into it, or to continue distinct from it. Where no intention is expressed, or the party is incapable of expressing any, I apprehend the court considers what is most advantageous to him. Upon that principle it was held, in *Thomas v. Keymiss*, that it was much more beneficial to the infant that [the estate] should continue personal property, because an infant had the use and disposition of that before twenty-one, but he could have no disposable interest in a real estate till that age. There is a case of *Gwillim v. Holland*, referred to in 2 Ves. jun. 261. 264, where Mrs. Holland had a charge upon an estate which she took by devise from her brother: he had made a mortgage on it: the counsel said, Lord Hardwicke thought that was no merger, because it was more

there be any collateral advantage in continuing it.

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As if it afford infant opportunity of bequeathing money;

Or preserve priority amongst incumbrancers. beneficial for her to take it as a charge. Lord Rosslyn said, the intervening incumbrance prevented the merger, and it was more beneficial for the person entitled to the charge to let the estate stand with the incumbrance upon it, than to take it discharged of the incumbrance, and give a priority to the second incumbrancer." 18 Ves. 384. 389; et vide ante, vol. i. p. 368, *in notis*.

Acceleration of charges. It has been thought that if there are two mortgagees, and the first, in point of charge, purchases the inheritance, he lets in the other on the estate discharged of the prior mortgage. Sugd. Vend. & Pur. 352, n. 4th edition. But this opinion is not only contrary to the principle of *Kennedy v. Daly*, 1 Sch. & Lef. 355, but is in direct opposition to the third point in *Mocatta v. Murgatroyd*, 1 P. Wms. 395, wherein it was laid down, that if a first mortgagee takes a release of the equity of redemption, this does not oblige him to pay the intermediate mortgages, provided he will waive the release made to him of the equity.

From a late case it may be inferred, that a first mortgagee buying the equity of redemption, and taking a conveyance thereof to himself in fee, or selling his mortgage to the person entitled to the equity of redemption, and assigning it directly to him, so that the debt and estate must necessarily merge, except as to the intermediate incumbrance, will let in that secondary charge as the primary incumbrance on the estate. The only way to prevent this is, by assigning the mortgage, or taking a conveyance of the equity of redemption to or in the name of a trustee; and even then if the purchasing party have at the time actual or constructive notice of the intermediate charge, the interposition of a trustee will not prevent the acceleration of the secondary charge in equity, whatever it may do at law. *Parry v. Wright*, 1 Sim. & Stu. 369.

Portion dies with infant portionary.

Where there is a charge upon lands, to be raised and paid at a certain future period, and the person entitled to the charge dies before the time arrives, the money will not be raiseable at all, but will sink into the land. *Poulet v. Poulet*, 1 Vern. 204. *Duke of Chandos v. Talbot*, 2 P. Wms. 600. 612. *Ehoin v.*

Blain, 8 Ves. 547. *Jennings v. Looks*, 2 P.Wms. 276. *Bayley v. Bishop*, 9 Ves. 6. Butl. Co. Litt. 237, a. n. (1). Butl. Fearn, 555, n. 6th edition.

If a mortgage be made by demise for 500 years, and the mortgagee, designing that the mortgagor should release to him his equity of redemption to make the term absolute, obtain a release from the mortgagor, whereby he releases all his right, title, and interest, in the land, such release will extinguish the term for years, and turn it into an estate for life; for no estate being expressed, it will be intended an estate for life only. *Anon.* 1 Freem. 474, pl. 650.

Release destroys term, and confers life estate.

SECTION XV.

Practical Observations in preparing Mortgages.

THAT the security be ample and the title good, are the primary and indeed principal objects in every mortgage transaction. The amplitude of the security falls more within the province of the client than the attorney, but, for the soundness of the title the attorney is responsible, that is, he must use due diligence in investigating every part of it. If a will be abstracted, omitting a condition, he will be answerable for the consequences of not detecting the omission, so that if the condition be broken and the security be thereby rendered invalid, the attorney will be accountable to the mortgagee for the loss. In like manner, if a recent instrument of bargain and sale, which is stated on the abstract to have been duly enrolled, be by some mistake not so perfected, it rests with the attorney to make good any loss which his laches in neglecting to look to the validity of the instrument may occasion.

Attorney responsible for bad title.

But if, as in a case which lately came under the cognizance of the editor, a deed contains a covenant to levy a fine, and the chirograph, or, as they are commonly called, the indentures of fine are forged (a thing easily accomplished), the attorney, it is presumed, will not be answerable for omitting to obtain an official extract of payment of the king's silver, particularly if the fine be of some years standing. These instances

His duty in perusing abstract.

are adduced to shew what kind of diligence the attorney should use, and for what species of neglect he will be answerable; he will be deemed cognizant of the true operation of every document abstracted, and of all equities, however doubtful or obscure; that is, he will be answerable for any defect which he may pass over. It is not to be supposed that any man, whether attorney, counsel, or even judge, can be acquainted with all law, (2 Carr. & Pay. 116); but if there be reasonable ground of doubt, and the attorney, on his own authority, treats the title as clear, he will be bound to make good any loss which may ensue on his careless or obtuse perusal of the abstract. The authenticity of the abstract is peculiarly within his province, and the most voluminous deeds must be thoroughly perused and apprehended by him. He can neither plead a misconception of the law nor ignorance as to facts, if with reasonable diligence he might have been well informed.

The duty of carefully comparing the abstract with the title-deeds he cannot by any possibility evade, except by express contract with his client. But the burthen of applying the immense body of property law to the exigencies of the case, he may throw on his counsel. If, after he has minutely attended to the examination of the abstract, he lays it before counsel of the degree of a barrister, and that counsel mistakes the operation of a deed, or forgets to apply appropriate law and approves the title, the attorney will be exonerated from making good any loss which may follow; he has done his duty as a prudent person, and the client cannot require more; yet, if any prominent blunder be apparent, it is assumed a jury would tax the attorney with want of common diligence in failing to observe a very palpable mistake. So, if he lay the abstract before a counsel who professes to practise in a totally different department of the law, one in fact who professes to take briefs and not abstracts. These cases, however, must for the most part rest on the evidence of their own particular merits; but one thing is certain, that a jury will require the attorney to shew that he has managed the transaction with becoming prudence.

*Case in which
attorney ad-
dled with loss*

In a case which lately occurred at Warwick, an attorney took upon himself to approve of the title, except in one par-

icular point, which he resolved into the shape of a case, and took Mr. Preston's opinion upon it. It turned out that the case was inefficiently drawn, and the evidence of Mr. Preston was, that he should have given a very different opinion, if he had been furnished with the whole abstract. It is scarcely necessary to add, that the verdict of a jury was against the attorney; who, consequently, was bound to make good the money which he had advised his client to lay out in the purchase of an estate to which the vendor could not make a sufficient title. The court said, that although it might not be part of the duty of an attorney to know the [full] legal operation of conveyances, yet it was his duty to take care not to draw wrong conclusions from the deeds laid before him, but to state the deeds to the counsel whom he consults, or he must draw conclusions at his peril. *Ireson v. Pearson*, 3 Barn. & Cress. 799.

occasioned by his misapprehension.

In another case an action was brought against the executrix of an attorney under the following circumstances:—The plaintiff being applied to by a Mr. Freshfield, to make him an advance of money upon the security of a legacy under the will of a relation, by way of assignment, employed the testator, an attorney, to prepare the deed, which he did, and the money was advanced. It turned out that the bequest in the will was qualified by a condition, that if any legatee should "assign his legacy" or should in any manner conduct himself in reference to the will "so as to give trouble to the trustees," his legacy should become absolutely void. The assignment led to a suit in equity, which terminated in a decree declaring the legacy void, and the security becoming unavailable, the plaintiff sought in the present action to recover the damages thereby sustained. A letter from the testator to the plaintiff was admitted, in which he adverted to some doubts which had been raised as to the validity of the legacy, but added, that he thought the objection must fail, as the assignment was not calculated "to give any trouble to the trustees." To prove direct instructions to the testator to examine the will, a witness was called, who stated that she accompanied the plaintiff to Mr. Tucker's, and heard the former request the latter to pre-

He must examine the whole will, and not be content with a mere extract from it.

pare the assignment, and to go to Doctors' Commons and examine the will, at the same time warning him to pay no regard to any thing Mr. Freshfield might say; and that at a subsequent interview, Mr. Tucker said to her, he was afraid Mr. Wilson would lose his money, adding, "if he does not, I shall."—For the defendant, the testator's clerk was called, who was present at the time the supposed instructions were given, and negatived any mention of Doctors' Commons being made. The plaintiff merely gave orders for the assignment, adding, that he knew the security was good, as he had inquired of the trustees; and upon this evidence it was contended, that the plaintiff's own conduct was such as to lull the testator's vigilance to sleep, and to exonerate him from those precautions which it would otherwise have been his duty to take, and consequently, that the plaintiff could not recover.

ABBOTT, C. J.—It appears in this case, that an extract from the will, containing the legacy to Freshfield, was furnished by the plaintiff, to the testator, and no more, and the complaint against him is, that he rested satisfied with that extract, and did not examine *all* the will, as it is contended he ought to have done. In point of law it was clearly his duty, as the attorney employed by the plaintiff, to examine the whole of the will, unless any thing was said or done by his employer, which could fairly and reasonably lead him to think that such a precaution was unnecessary. If the plaintiff really charged him to examine the will, then he was clearly guilty of the negligence imputed to him by omitting to do so; if, on the contrary, the plaintiff told him, that he knew the will was sufficient and the security good, his caution might perhaps be not unnaturally lulled to sleep, and his liability in consequence removed. Upon this point there is contradictory evidence; but there are other important facts uncontradicted, namely, that Mr. Tucker, on one occasion, when speaking of the transaction, said, "If Wilson don't lose the money, I shall," and that in his letter to the plaintiff he betrays both a consciousness of neglect, and a desire to avoid the consequences of it, by misrepresenting the import of the disqualifying clause in the will. It is peculiarly for a jury to decide upon

such evidence, but there should, I think, be strong facts to absolve an attorney from those duties and liabilities which the law imposes on him, and the benefit of which it is the very object of his employer to secure. The jury found for the plaintiff. *Wilson v. Tucker*, 1 Dow. & Ry. N. P. C. 80.

In examining a title for a mortgagee much stricter proof is in many particulars requisite, than in investigating an abstract for a purchaser. For a mortgagee the title must be as free from suspicion as Cæsar's wife, but a title open to suspicion merely, in which there is no actual flaw, may, unless the presumptions of impurity are very violent, be enforced even on an unwilling purchaser, yet there are titles which a mortgagee may safely accept, and a purchaser fairly refuse. A mortgagee does not take a conveyance of the land with a view to occupation; he considers the land merely as a pledge for his money. This gives rise to a different mode of treating the abstract of title; on this account, many points may be conceded on inspecting the title for a mortgagee, which could not be dispensed with in perusing it for a purchaser. A mortgagee looks to the land not as land but as a security for his money. Viewing the money as his, and not the land, he wants such a title as may be converted into money on the shortest possible notice,—a title which is strictly marketable. A purchaser however looks to the possession and occupation of the land, and a safe holding title is in many cases all that he desires. Thus, if allotments are made under an inclosure act generally, in respect of two farms held under different titles, a mortgagee may advance money on one farm and *part* of the allotments, if the security be ample; for the expence of dividing the allotments will fall on the mortgagor; not so with a purchaser, who may require that the allotments be apportioned by legal means at the vendor's expence, since otherwise the costs of division may, on a future sale, fall on him. So, many observations may arise on an abstract for the consideration of a purchaser on account of want of evidence of the title to lands received in exchange, which may not be of any great importance to a mortgagee, unless the exchanged lands are essential to his security.

What kind of title a mortgagee requires.

Value of
estate.

With reference to the value of the estate, *that* is a subject which more immediately falls within the province of the client, and the attorney should always invite his attention to it. It is not unusual, where the client cannot be supposed to be cognizant with the value of the property proposed to be mortgaged, to call in the assistance of a surveyor, the expence of whose attendance should in fairness fall on the mortgagee, but by stipulation it is not unfrequently thrown on the mortgagor. As between perfect strangers it is not considered unfair for the mortgagee to say to the borrower, "you must satisfy my attorney and surveyor that the title is good and the security ample, but if you should fail to do so, you must pay their charges." Without a stipulation to this effect, the mortgagee must pay his own attorney and surveyor if the treaty goes off. The rule is not to advance more money on the estate than to the amount of two-thirds of its value. And if the property consist of houses, some deduction in the estimate should be made for the laches of tenants, the non-occupation of the premises, and other contingencies to which that species of property is inevitably incident.

Procuracion-
money 5s. per
cent. the utmost
that can be re-
covered.

On the subject of procuracion-money the following case on that subject lately occupied the attention of the Court of Common Pleas:—The defendant being entitled to the advowson of Bulvan, in Essex, and being also incumbent, was desirous of disposing of the advowson, subject to his own incumbency. For this purpose, he employed the plaintiffs to sell it. The plaintiffs having failed in their attempts to sell, applied to an attorney, by negotiation with whom a loan of 4200*l.* was ultimately effected, but without any further interference on the part of the plaintiffs. The plaintiffs now brought an action against the defendant to recover 105*l.*, being a commission of $2\frac{1}{2}$ per cent. for procuring for the defendant the loan of 4200*l.* on mortgage of the said advowson. In support of their claim to the commission, they produced before the secondary several letters from the defendant to them, in one of which the defendant stated, that he certainly would not object to the plaintiffs' terms of $2\frac{1}{2}$ per cent. if they would finish the business speedily. On behalf of the defendant it was objected that the demand of $2\frac{1}{2}$ per cent. was illegal, under the statutes

and
Capt. Hutton
26.29.
3 (unpaid)

of usury, 12 Car. 2. c. 13. s. 3, and 12 Anne, stat. 2. c. 16. s. 2, which limit the commission upon the procuration of loans to *5s. per cent.* The jury returned a verdict for the defendant damages 10*l.* 10*s.*; to set aside which, a rule nisi had been obtained; cause was now shewn, but,

By the Court:—The plaintiffs were applied to by the defendant to procure the sale of an estate, or an advance of money upon it. The sale was not accomplished, but the plaintiffs endeavoured to procure a loan; they say they went to an attorney for that purpose, and for that they make their charge: it is clear, therefore, that they did assist in procuring the loan. For this service can they charge *2½ per cent.*, or are they confined to *5s.*? We need not say, whether or not they have been guilty of a punishable offence, but the transaction in which they have engaged is clearly within the policy of the act, and it would be contrary to its provision to allow more than *5s. per cent.* for the plaintiffs' services. The object of the act was, to protect persons in distress against the extortionate exaction to which they might otherwise be exposed in the attempt to procure money for their exigencies. After providing that no more than a certain rate of interest shall be taken upon loans, it goes on to enact, that "all and every scrivener and scriveners, broker and brokers, solicitor and solicitors, driver and drivers of bargains," (the plaintiffs are drivers of bargains; they do not indeed, drive the nail to the head, but they find out a person who undertakes the work, and they allow it to be driven; they assist in driving; and if they assist, they are drivers;) "who shall take for soliciting, driving, or procuring the loan or forbearance of any sum of money over and above the rate or value of *5s.* for the loan of 100*l.* shall forfeit for every such offence, 20*l.* with costs of suit, and suffer imprisonment for half a year." Have they not solicited? Have they not procured the money? If they had obtained the whole, they could only have charged *5s. per cent.*, and it would be absurd to allow them to charge more for obtaining less than the whole. It is of importance that improvident persons should be protected, and not be allowed to surrender to those harpies who pray on the unwary, the money which

belongs to their *bona fide* creditors. It should be fully understood, that persons engaged in these transactions, are not only liable to lose their charges, but to pay a fine of 20*l.*, and suffer imprisonment for half a year. Rule discharged. *Pryce and another v. Wilkinson*, 2 Bing. 474.

The contents of the ten pages of *Addenda*, occupying from 1091 to 1100 in the 5th Edition, have, in this Edition, been placed in connexion with the subjects to which they relate, as follows:—

- [1091] carried to p. 16, n. (N), *Bond and Covenant*.
 17, n. (A), *Expectant Heirs*.
 27, n. (I), *Bill of Lading and Freight*.
 32, n. (Q), *Additional Authorities*.
 44, n. (H), *Additional Authorities*.
 48, *Fraudulent Conveyances*.
- [1092] carried to p. 58, *Idiotcy. Lunacy*.
 59, *Infancy*.
 102, n. (P), *Executor. Devastavit*.
 106, n. (A), *Papist*.
 116, *Irish Lease and Loan*.
 116, n. (H), *Additional Authorities*.
 122, n. (N), *Trustee. Cestui que Trust*.
- [1093] carried to p. 125, n. (P), *Absolute Conveyance*.
 141, n. (V), *Adowson*.
 156, n. (A), *Mortgagor's Tenancy*.
 159, *Lease*.
 165, *Waste*.
- [1094] carried to p. 165, *Waste*.
 166, *Parochial Settlement*.
 170, n. (T), 7 Geo. 2. c. 70.
- [1095] carried to p. 176, n. (F), *Lessor's Title*.
 178, *Building Lease*.
 190, *Renewal*.
 195, n. (U), *Renewal*.
 203, n. (E), *Suits*.
 205, n. (K), *Infant Mortgagee*.
 211, n. (N), *Lunatic Mortgagee*.
 212, n. (O), *Voluntary Settlement on Collaterals*.
 214, n. (A), *Application of Money*.

Settlement to A. in tail, remainder to the right heirs of B. means B.'s right heir at the time of failure of A.'s issue. Semb.

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In the year 1781, George Earl of Orford, (No. 10) being seised to him and his heirs (by descent from his mother Margaret, the only daughter of Samuel Rolle) of three estates in the counties of Dorset, Devon, and Cornwall, by a voluntary settlement, dated August, 1781, after reciting, "that he was desirous that the hereditaments thereafter mentioned, should continue and remain in the family and blood of the said Samuel Rolle," conveyed and assured the premises in the counties of Devon and Cornwall (the estates in dispute), to the use of himself for life, with remainder to the heirs of his body; and for want of such issue, to the use of such person as he should appoint, and in default of appointment "to the use of the right heirs of the said Samuel Rolle for ever." The deed contained a general power to the said Earl, of revoking the uses therein specified, and of limiting new uses of the same hereditaments. In September of the same year, Lord Orford settled his Dorset estate to such uses as he should appoint, and for want of appointment, to the use of Mrs. Tuck for life, with remainder to the use of Horatio Walpole for life, with remainder to the use of Horatio Walpole's first and other sons in tail male, with remainder to his daughters in tail, with remainder to the use of the right heirs of the said Samuel Rolle for ever, with powers of revocation and new appointment to him the said Earl. Four years afterwards Lord George borrowed 20,000*l.* of Sir Edward Hughes, and in 1785, (without noticing the previous settlements) conveyed the estates in Dorset, Devon, and Cornwall, to Sir E. Hughes in fee, subject to redemption on payment of 20,000*l.* and interest, by the said Lord Orford, in which case Sir E. Hughes agreed to re-convey, &c. Lord Orford died in 1791, without issue, and without appointment; whereupon the equity of redemption in the Dorset estate descended to Horatio Walpole, under the settlement of September, 1781, and the equity of redemption in the two other estates descended to Robert George William Trefusis, Lord Clinton, (No. 4) as the right heir of the said S. Rolle, under the settlement of August in the same year. Lord Clinton entered into possession of the Devon and Cornwall estates, and in 1792 conveyed them to trustees and their heirs, upon trust, to raise by sale or mortgage a sum of 44,000*l.* to pay off a mortgage of 7000*l.* upon other estates of his Lordship, and upon other trusts specified in a deed of even date; and subject thereto, to the use of Lord Clinton for life, with remainder to his first and other sons in tail, with remainders over.

Mortgage a partial revocation.

The trustees in this settlement being about to raise money as directed by the deed, a question arose whether the mortgage to Sir E. Hughes of 1785, operated as a total, or only as a partial revocation of the several deeds of August and September, 1781—if they operated as a total revocation of these settlements, then the descents of the equity of redemption as above stated could not be supported, and the estates would devolve on Horace Earl of Orford, (No. 7) as the uncle and heir-at-law of George Earl of Orford, (No. 10). This question was settled to the satisfaction of the parties, and, as it is conceived, on sound principles of equity, (see ante, vol. i. p. 411, n. (E).) by the opinions of Sir A. Macdonald and Mr. Shadwell. The following is a copy of the latter gentleman's observations:—"The intention of the deeds of

1785, being merely to transfer an incumbrance, which had existed for near sixty years, to a new mortgagee, and there being no notice taken of the settlements of 1781, nor any recital of the late Earl's desire of vesting the fee-simple in himself in opposition to the uses of the settlements, I am of opinion that in equity those uses are not revoked, and that, subject to the mortgage (which, if not dischargeable out of other funds, will fall proportionably upon both settled estates), the equity of redemption will go according to the limitations of the respective settlements.—*Lancelot Shadwell, Lincoln's-Inn, January, 1792.*" Sir A. Macdonald was of the same opinion. In consequence of which, Earl Horace relinquished the point, and by deeds of confirmation, dated April, 1794, conveyed the said estates in Devon and Cornwall to such and the same uses as were limited and declared by the deed of 1792, in corroboration thereof to all intents and purposes as if the mortgage of 1785 had not been executed. The title of the trustees being thus fortified, Sir Lawrence Palk advanced them the sum of 44,000*l.* taking from them a mortgage in fee, the redemption of which was reserved to the trustees. Lord Clinton afterwards died, and the estates in question devolved on his son, the present defendant, (No. 9).

In 1805 Sir L. Palk filed his bill against Lord Clinton, Lady Hughes, and others, praying an account of what was due (1) the mortgage of 20,000*l.* (which by the will and death of Sir E. Hughes had devolved on Lady Hughes); also an account of what was due to him the plaintiff under his own mortgage; and that the trustees under the deed of 1792 might be decreed to sell so much of the estates comprized in that deed, as would be sufficient to pay the sums that might be found due on both securities. The plaintiff, however, during the arguments, consented that so much of the bill as prayed a sale for the purpose of raising the 20,000*l.* should be dismissed; admitting, that the trustees had no power to raise that sum; and as to the other sum, the Master of the Rolls was of opinion that the plaintiff had no right to call upon the trustees to sell in order to pay even that sum. The plaintiff was no object of the trust farther than as that trust enabled the trustees to make him a good mortgage. When he had that, he was in the ordinary situation of a mortgagee. He had all the remedies, but only the remedies of a mortgagee; and his Honor thought it very doubtful whether the trustees could make any sale, after they had raised the money by mortgage. The plaintiff then prayed to redeem the first mortgage, to which it was objected that sufficient parties were not before the court; and his Honor was of opinion that there was a clear necessity of having Mr. Walpole before him, as well as Lord Clinton. Liberty was then desired to amend generally; but here again the Master of the Rolls was against the plaintiff; for he saw great force in the objection, that a cause could not be re-cast and shaped differently from what it originally stood. That indeed would lead to great litigation. Parties would draw their bills with very little caution; knowing they might alter them. But as the plaintiff's counsel had expressed their readiness to take such order as the court would grant, his Honor allowed the plaintiff to amend generally, by adding parties; and to pray a redemption or

*Sir L. Palk's
cause.*

tion. There is nothing executory in it; nothing which gives the court a power to modify the means by which the grantor himself proposed to arrive at his end. The deed too is purely voluntary. There is no contract which can entitle any person to say, that if the words of the deed go beyond, or fall short of, the intended purpose, it ought to be so construed, or so reformed, as to place the parties in the situation in which, by their bargain, they were intended to stand. *Upon the whole of this part of the case, I am of opinion that Lord Clinton took no estate under the deed of 1781,*

II. As to the effect of the deed of confirmation of 1794, the rule is laid down in *Braybroke v. Inskipp*, 8 Ves. 417, that where a man is called upon to join in a conveyance for the purpose of obviating a specified objection to the title, he will not be bound by it, as to any interest of which he has not been apprized. But if he consents to join in the conveyance, upon being told generally that there are objections to the title, he must be taken to have inquired into the nature of those objections, and cannot afterwards raise a question as to the extent of his information. Now, it is clear that the deed of confirmation, in the present instance, was neither applied for nor obtained with any view to the purpose to which it is now endeavoured to convert it.

III. It seems to me that there is no room, in this case, for the operation of the statute of limitations. Even at law it is not mere possession that is sufficient to bar the claim of the true owner. *There must be something tantamount to a disseisin.* Now, though there may be what is deemed a seisin of an equitable estate, there can be no disseisin of it, first, because the disseisin must be of the entire estate, and not of a limited and partial interest in it, and the equitable ownership cannot possibly be the subject of disseisin; and, secondly, because a tortious act can never be the foundation of an equitable title. An equitable title may, undoubtedly, be barred by length of time; but it cannot be shifted or transferred. What was once my equity, may, by my laches, be wholly extinguished; but it cannot, without my act, become the equity of another person. It does not therefore follow, *that an equity can be acquired by length of possession, because by length of possession it may be barred.* If it did, Lord Hardwicke's position in *Hopkins v. Hopkins*, 1 Atk. 581, would no longer be true; for disseisin, abatement, or intrusion, would then be available modes of acquiring equitable estates. A mortgagee may assume the possession whenever he pleases, and therefore a mortgagor is called a tenant at will to the mortgagee, and in point of possession he is so even in equity; for a court of equity never interferes to prevent the mortgagee from assuming the possession. Lord Clinton, therefore, when he acknowledged the title of the mortgagee, had nothing but a precarious and permissive possession, which, however long it might have endured, could never ripen into a title against any body; for it was not considered as the possession of the precarious occupier, but of him upon whose pleasure its continuance depended. I am of opinion that the person who has the equity of redemption in the present case is the plaintiff, Mrs. Damer,

as the devisee of Horace Earl of Orford; for as there could be no disseisin of an equitable estate, there was nothing to prevent him from devising this interest, and the general words of the will are sufficient to include it. (See also 2 Pres. Abs. 383.)

As to Sir Lawrence Palk he has lent money on what turns out to be a bad title. Where is the obligation upon the right owner to give him a bad one? Lord Orford could not be said to acquiesce in acts which he did not know he had any right to dispute; and therefore all that has been said about acquiescence, either on the part of Lord Clinton, or Sir Lawrence Palk, seems to be irrelevant, in a case where all parties were under the influence of the same common mistake. There is no principle, therefore, on which I can hold that Sir Lawrence Palk's mortgage is a good charge on the equity of redemption. 2 Meriv. 362.

The first of the above questions being a mere legal question, a case was sent to the Court of King's Bench. The Judges differing in opinion returned the following certificates:—“This case has been argued before us by counsel; and considering that the words ‘the right heirs of Samuel Rolle’ are words of plain and well known import, and, according to that import, must denote George Earl of Orford, the settlor, we think that Robert George William Trefusis, afterwards Lord Clinton, took no estate under the said indenture of the 2d August, 1781.”—C. Abbott, G. S. Holroyd, W. D. Best. “This case has been twice argued; and considering that it appears by the indenture of 2d August, 1781, that the said George Earl of Orford knew himself to be the then heir of Samuel Rolle; considering also that during the life of the said George Earl of Orford, or so long as there should be any issue of his body, no person could legally come within the description of right heir of Samuel Rolle but the said George Earl of Orford and his issue, who were of the united line of Walpole and Rolle, and were all provided for by the estate tail created by that indenture; considering also that it appears plainly by that indenture, that the said George Earl of Orford meant to provide for the separate line of Rolle; that no person of that separate line could come within the description of right heir of Samuel Rolle, till the united line should be exhausted; and that a limitation, by way of remainder to heirs or children, is not necessarily confined to such persons as are within that description at the time the limitation is created: I am of opinion that the effect of the indenture of 2d August, 1781, was to vest in the said George Earl of Orford an estate in tail general, with remainder (if he should make no appointment) to such person as, at the expiration of that estate tail, should be right heir of Samuel Rolle in fee; and consequently that the said Robert George William Trefusis took an estate in fee under the said indenture.” J. Bayley. 2 Barn. & Ald. 642.

Case and certificate from court of law.

On the 10th March, 1820, the cause was again revived on the equity reserved. Sir Thomas Plumer, M. R. entered fully into the merits of the case, and in the course of an elaborate and convincing judgment, observed as follows:—The primary object of inquiry in construing deeds as well as wills is the intention of the

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Sir T. Plumer's judgment.

party; where that is, on the face of the instrument, clearly and satisfactorily ascertained, and found not to be contrary to any rule of law, the court is bound, if the words will admit of a construction conformable to the intention, to adopt that construction, however contrary it may be to technical meaning and inference. Now, to suppose in the present case that Lord Orford meant to give the remainder to himself, is an argument that amounts to a *reductio ad absurdum*. It would suppose Lord Orford to have entertained, at the same moment, intentions on the same points directly opposite to and incompatible with each other. When the limitation is intended to apply to Lord Orford, he is mentioned by his proper name and title, "George Earl of Orford." Why should there have been this change in the description, if the same person were throughout intended? Again, how are we, on this hypothesis, to account for the powers of appointment and revocation specially reserved to Lord Orford, in the limitations preceding and following the limitation in question. I feel therefore strongly inclined to concur with Mr. Justice Bayley in his opinion of the deed of 1781.

The objections which have been taken, on the part of the defendants, may be reduced to four heads:—1st, As to the want of proper parties as defendants to the suit; 2dly, As to the frame and nature of the bill and the relief prayed; 3dly, As to the effect of the deed of confirmation of 1794; and, 4thly, As to the effect of length of time.

First, the defendants insist that all the persons eventually interested in the estate under the settlement, made by the late Lord Clinton in the year 1792, ought to have been made defendants. I think this objection is not well founded. It is sufficient to have brought before the court the trustees of [qu. and] the person in *esse* entitled to the first vested estate of inheritance. *Those who have contingent interests are not necessary parties.* Lord Hardwicke, in *Hopkins v. Hopkins*, states the established rule on this point. "If (says he) there are ever so many contingent limitations of a trust, it is an established rule, that it is sufficient to bring the trustees before the court, together with him in whom the first remainder of the inheritance is vested, and all that may come after will be bound by the decree, though not in *esse*, unless there be fraud and collusion between the trustees, and the first person in whom a remainder of inheritance is vested." 1 Atk. 590. But the objection that the person who is entitled to the Dorset estate ought to have been a party, is, I think, better founded. The estates in all the three counties of Dorset, Devon, and Cornwall, are equally subject to, and comprehended in one and the same mortgage, and must therefore all be redeemed together. *The owner of part of the estate in mortgage cannot separately redeem his part.* The mortgagee is entitled to insist, that the whole of the mortgaged estate shall be redeemed together; and for this purpose, that all the persons interested in the several parts of the estate as mortgagors, should be made parties to the bill seeking the account and the redemption. A mortgaged estate sold in twenty lots might otherwise be made the subject of twenty dif-

ferent bills for redemption, with all the consequences upon the account and re-conveyance. The bill is also defective in not having made the personal representative of the late Lord Clinton a party, who is stated in the bill to have been some time in possession of the rents and profits, and to have paid the interest and part of the principal of the first mortgage.

As to the second head, I think the bill should have been by Mrs. Damer alone; for it is not true, as the bill states, that upon the death of Horace Earl of Orford, "your orator and oratrix became entitled to the same."

The third head we pass by, and hasten to the

Fourth and last objection, which calls for a separate, immediate, and unequivocal determination. Mrs. Damer, the devisee, is on all sides admitted to be the only person who could have any claim of title under Horace Earl of Orford to this estate; and the full period of twenty years having elapsed since the death of George Earl of Orford, when that title, if at all, first accrued, the remedy would have been taken away by the statute in consequence of the laches and non-claim. The lapse of twenty years affords a substantive insuperable plea in bar. It is the fixed limit to the remedy—the *tempus constitutum*. One day beyond is as much too late as one hundred years. This is the peremptory inflexible rule at law, fixed by positive statutes, if there has been adverse possession, and no disability or fraud. No plea of *poverty, ignorance, or mistake*, can be of any avail. However clear and indisputable the title, if the merits could be inquired into, however demonstratively tortious and wrongful the adverse possession, the fact of such possession, and the time, preclude all investigation of the title. The door of justice is closed. The claimant cannot be heard to shew his title. It is a decisive answer to him that he comes too late. That alone is the bar. His title remains, but he has lost his remedy. The time having begun to run against Horace Earl of Orford, must continue to run on against those claimants under him. Then as to the mortgage; so long as the incumbrance continues, the interest must be paid by whoever is the owner of the estate, as much as the taxes or any other out-going. Payment thereof is an admission of the debt, and is in itself the strongest exercise of adverse possession. It is a public usurpation of the character of a mortgagor from year to year doing the acts which belong to it. The statute of limitations applies by analogy to equitable claims. This is fully proved by numerous cases, in particular, by those of *Bond v. Hopkins*, 1 Sch. & Lef. 420; *Hoven-don v. Annesley*, 2 ib. 630; and *Medlicott v. O'Donnell*, 1 Ball & Be. 164, in which latter case Lord Chancellor Manners thus expresses himself:—"I think then I stand well supported by principle and authority in saying, that the court is bound to regulate its proceedings by analogy, or in obedience to the statute of limitations. Upon the uniform concurrence of a long train of the highest authorities, I can entertain no doubt in the present case. It is clear, that had it been the claim of a legal estate in a court of law, the remedy would have been barred by the statute of

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limitations. It is therefore clear, that being an equitable estate, the remedy must, by analogy, be equally barred in a court of equity."

Here I might close the argument, but in deference to the high authority by which a contrary conclusion has been formed, I shall proceed to examine the grounds and principles on which it is founded.—That the bar from length of time and non-claim never can effect an estate so long as it is covered by a mortgage, is a proposition now for the first time advanced. The relation subsisting between mortgagor and mortgagee is one of a peculiar and anomalous nature. The possession of the mortgagor, or the person claiming that character, is not adverse to the mortgagee, because it is consistent with his title. The mortgagee is, therefore, not barred by any length of that possession; but the possession of the mortgagor is adverse to every other claimant of the equity of redemption, because it is inconsistent with his claim of title. Against him, therefore, it will operate as a bar, if acquiesced in beyond the limited period. Payment of the interest of the mortgage by the mortgagor, or the person claiming to be mortgagor, to the mortgagee, is a recognition of the right and title of the mortgagee, and preserves it unbarred; but it cannot be deemed a recognition of the right or title of any other person to be the mortgagor. It is an act of a directly contrary import. By making the payment in his own name, and on his own account, he takes upon himself to do an act that belongs to the mortgagor, and thereby virtually declares that character to belong to himself. It would be a perversion of inference to convert an act, done for the purpose of the assumption of the character exclusively to himself, into an admission of its belonging to another.

It is said, that the mortgagee is a trustee for the mortgagor, that their interests are parts of one title, and together form one entire estate; and that the admission of the title of the one is virtually an admission of the title of the other. This seems founded on a mistaken notion of the resemblance between the characters of trustee and mortgagee. The mortgagee, when he takes possession, is not acting as a trustee for the mortgagor, but independently and adversely for his own use and benefit. A trustee is stopped in equity from dispossessing his *cestui que trust*, because such dispossession would be a breach of trust. A mortgagee cannot be stopped, because in him it is no breach of trust, but in strict conformity to his contract, which would be directly violated by any impediment thrown in the way of the exercise of this right. This presents no resemblance to the character of a trustee, but to a character directly opposite. It is in this opposite character that he accounts for the rents when in possession, and when he is not receives the interest of his mortgage debt. The payment of that interest, by the person claiming to be the mortgagor, is a recognition of that relation subsisting between them, but is no recognition of the mortgagee's possessing the character of trustee, much less of his being a trustee for any other person claiming the same character of mortgagor. He does not at any time possess, like a trustee, a title to the legal estate, distinct and

separate from the beneficial and equitable. The estate is not committed to his care, nor has he the means of preventing or being acquainted with the changes which the title to the equity of redemption may undergo, either by the act of the mortgagor, without his privity, or by operation of law, by descent, forfeiture, or otherwise, and consequently, as I have already endeavoured to shew, by the operation of the analogy to the statute of limitations.

The mortgagee is a mere indifferent stake-holder. The real contest lies between the competitors for the estate, which, in the hands of either, must continue subject to the mortgage till paid off: when paid off, the mortgage title ends; and then, and not before, the implied trust to surrender the estate to the person entitled to demand it, begins. Payment of the interest operates between Lord Clinton and the mortgagee, to keep alive the mortgage debt. It is a continued mutual recognition of his title as mortgagor and that of the person to whom the payment is made as mortgagee. But it has no effect beyond this, or with respect to any other person, except as it tends to exclude the title of any other person to either character. Actual possession by the mortgagee might have had a different effect, because that would have been consistent with Mrs. Damer's title, and not adverse to it. And yet even if this actual possession of the mortgagee had continued for twenty years, without any payment of interest by the mortgagor, or any thing done or said during that period, to recognize the existence of the mortgage, or to acknowledge it, on the part of the mortgagee, it would clearly operate as a bar to redemption by the mortgagor. And such is the prevalence of analogy in equity, that even under circumstances of poverty and distress, the possession of the mortgagee for twenty years, without a recognition of the mortgage title, or any account kept upon the footing of it, becomes a subject of equitable bar to redemption. In the present case, possession is taken adversely under no contract expressed or implied, by a stranger, between whom and the person wrongfully kept out of possession, there is no privity or engagement of any kind, who is under no obligation to render any account, whose possession is, from the first, inconsistent with, and therefore adverse to, the title of the rightful mortgagor. Surely, upon every principle of reason and equity, the same analogy to the statute of limitations which prevails in the one case, must, *a fortiori* prevail in the other. It is upon this ground alone, and I am anxious it should be distinctly so understood, without resting upon any of the other points in the cause, that I think this bill should be dismissed.

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The bill was dismissed accordingly, but without costs, 2 Jac. & Walk. 180.

The decree dismissing the bill having been enrolled, the plaintiffs appealed to the House of Lords. The Lord Chancellor, in moving the judgment of the House, stated his opinion to be, that adverse possession of an equity of redemption for twenty years was a bar to another person claiming the same equity of redemption, and worked the same effect as disseisin, abatement, or in-

*Bill dismissed
and decree confirmed in Dom.
Proc.*

trusion, with respect to legal estates; and that for the quiet and peace of titles and the world, it ought to have the same effect.—Lord Redesdale was clearly of opinion that the plaintiffs were barred by the effect of the statute of limitations, and that the bill should therefore be dismissed. On the 15th June, 1821, judgment was accordingly given, affirming the decree at the Rolls in favor of the defendant Lord Clinton. On the same ground, another cause between the same parties has lately been decided. The Lord Chancellor observing, that where there has been adverse possession not accounted for by some disability, as coverture, or infancy, for twenty years, a court of equity ought not to interfere. 1Turn. 107.

Mortgage debt presumed satisfied after twenty years, without payment of interest, acknowledgment, or demand, and no difference from mortgage being in trust to sell.

CHRISTOPHER v. SPARKE.—On the statute of limitations three late cases remain to be noticed. The first, *Christopher v. Sparke*, 2 Jac. & Walk. 223, where A., B., and C., on a dissolution of partnership, referred certain matters in dispute to arbitrators, who awarded a sum of 1852*l.* to be due from A. and B. to C.—B. gave security for his moiety of the debt by a mortgage, dated May, 1795, which contained trusts for sale in cas of default. C. died in 1802, having, by will, given all his real and personal estate to the plaintiff (who was one of the arbitrators), upon trusts for the benefit of his wife and children. The bill was filed in November, 1815, against the heir at law of B., who stated, in his answer, that the award was surreptitiously obtained by the non-production of a certain book, wherein it would have appeared that the balance was against the mortgagee instead of in his favor; that B. had sold the premises to a *bonâ fide* purchaser in 1788, who had ever since been in possession; that twenty years had elapsed since the date of the mortgage without payment of interest, acknowledgment, or demand; and that there was nothing to repel the presumption of payment arising from length of time. It was also contended, that though the mortgage contained a trust to sell, still the case could not be stated higher than that of a bill of foreclosure, which, after twenty years without demand, and without payment of interest, could not be sustained (*Trash v. White*, 3 Bro. C. C. 289); for that notwithstanding what was said in *Toplis v. Baker*, 2 Cox, 118, the principle of presumption was considered to apply as well to mortgages as to bonds. *Blewitt v. Thomas*, 2 Ves. jun. 669. *Mead v. Earl of Bandon*, 2 Dow P. C. 268. The Master of the Rolls said, there were two ways in which length of time might operate in cases like this, when it was not a positive bar by virtue of the statute, viz. by raising a presumption, either that the debt demanded never was due, or that it had been paid. It was in the former mode, that it operated here. The only proof was the award; the question was, whether that created any debt; and surely the non-claim for twenty years, when the parties were in the way, and there was every opportunity for asserting the demand, was strong evidence against its existence. As to the case of *Trash v. White*, which had been cited, where Lord Thurlow thought that twenty years, without payment of interest or demand, created a presumption that the debt was satisfied, Sir Thomas Plumer had always understood it to be a principle, that when the twenty years have run upon a bond debt, without any thing to break the time, or any circumstance to account for it, that presumption did arise, but not ope-

rating as a positive statutory bar, it might be met by evidence, and by circumstances introduced to explain it. In the present case, the plaintiff's title failed by the absence of all proof on which it depended, and by the strong presumption against him, arising from the evidence of long possession. The bill was consequently dismissed, with costs.

DOE v. REED.—The second case is that of *Doe v. Reed*, 5 Barn. & Ald. 232, on the following circumstances:—In the year 1747, C., (under whom the plaintiff claimed) being indebted to R., gave him a judgment, and put him in possession of the rents and profits of the estates in question, until the debt, amounting to 850*l.* should be satisfied thereout. R. remained in possession until 1752, when he assigned over to the defendant's ancestor all the debt then remaining due and his right of possession to the estates. Under this assignment the defendants entered into possession, and continued such possession up to 1801, in which year a bill was filed in Chancery by C.'s family to recover possession. The case was sent to a jury, who were told by the Judge (Bayley) that the question for them to consider was, whether, under the circumstances, they could bring their minds to believe that a conveyance from C. or his son, to the defendant's family, had actually taken place. On the suggestion, that during the marriages of C. the father and son, no conveyance could have been made without levying a fine, which being of record, might have been produced, if it had existed, the jury found a verdict for the lessor of the plaintiff. Hullock, Serjt. now moved for a new trial, on the ground of misdirection. Lord C. J. Abbott was clearly of opinion, that the direction was according to law; for that the original possession was accounted for, and was consistent with the fact of there having been no conveyance. It might indeed have continued longer than was consistent with the original condition, but it was surely a question for the jury to say, whether that continuance was to be attributed to a want of care and attention on the part of C.'s family, or to the fact of there having been a conveyance of the estate. As the defendant's ancestors had originally a lawful possession, the Lord Chief Justice thought it was incumbent on him to give stronger evidence to warrant the jury in coming to a conclusion that there had been a conveyance. The point presented to the jury was the correct one. In his Lordship's opinion, presumptions of grants and conveyances had already gone to too great a length, and he was not disposed to extend them further. Bayley and Holroyd, J., being of the same opinion, the motion for a new trial was refused. 5 Barn. & Ald. 237.

Conveyance not presumed after fifty-three years, grantee having been let into possession as Welch mortgagee.

[1156]

HALL v. DOE.—The third and last case is that of *Hall v. Doe*, 1 Dow. & Ry. 340, and 5 Barn. & Ald. 687, where in a special verdict it was found, that a mortgage had been made with the usual proviso for re-conveyance on non-payment of the principal at a given day, and a covenant that the mortgagor should enjoy till default. The special verdict also found, that the principal money was not paid at the day, but that the mortgagor continued in possession, and that he and his heirs had been in possession for a period of thirty-seven years. There was no finding by the jury either that interest had or had not been paid by the mort-

Mortgagor in possession thirty-seven years, interest presumed paid all that time, if nothing to contradict it.

gagor; and the court said, that upon this finding it must be taken that the occupation was by permission of the mortgagee; and, consequently, that although more than twenty years had elapsed since default was made in payment of the money, still the mortgagee was not barred by the statute of limitations; for though it was not found as a fact in this case that there was any payment of interest, yet the court would presume that it was paid. If no interest had been paid, that would have warranted the jury, under the direction of the Judge, in finding that there had been a reconveyance. The argument against this view of the case proceeded on the ground, that the mortgagor was in possession by wrong; but as the special verdict did not find a wrongful possession, the court of King's Bench would certainly not presume it. In this case it was also held, that an entry is not necessary to avoid a fine levied by a mortgagor. 5 Barn. & Ald. 687.

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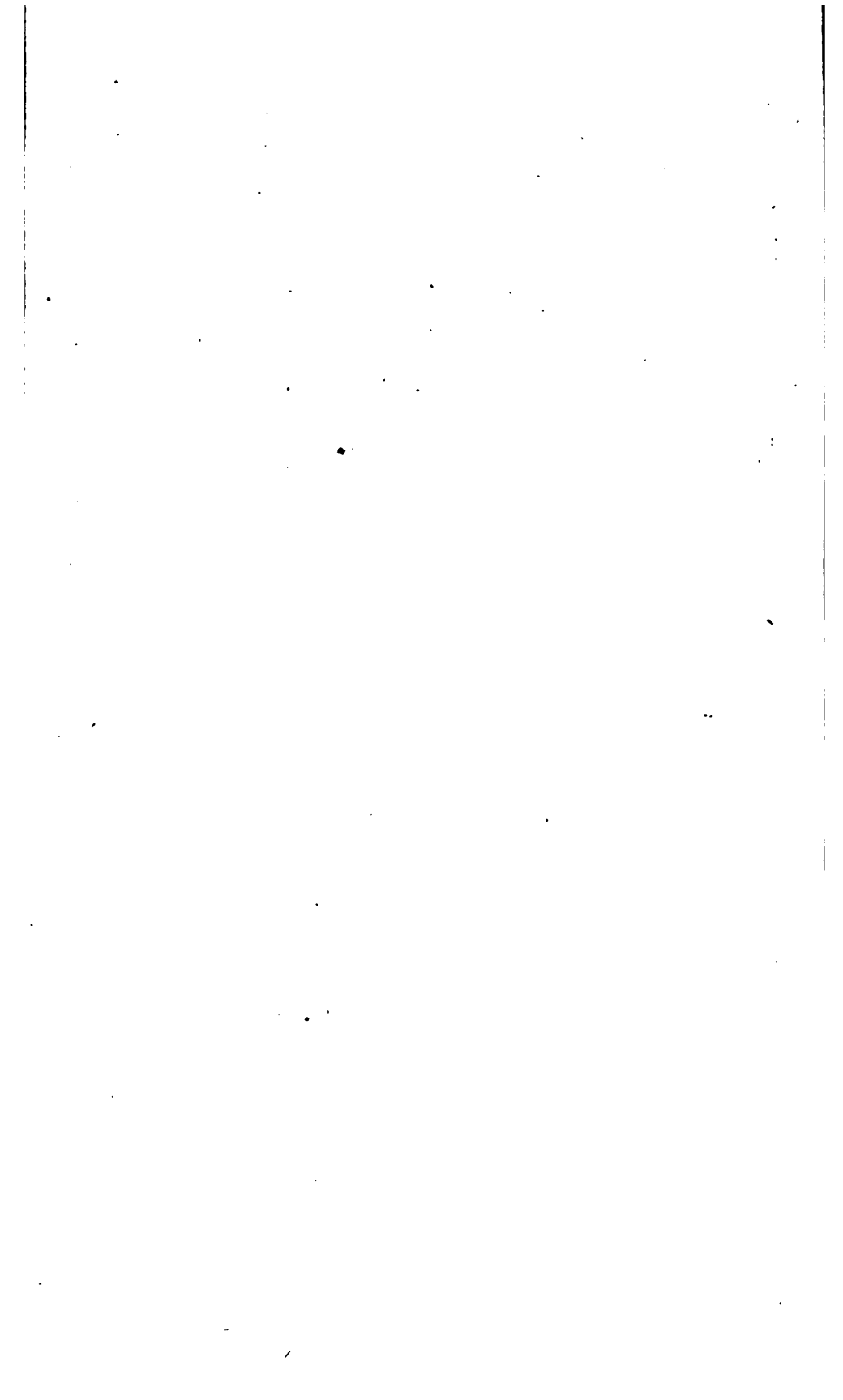
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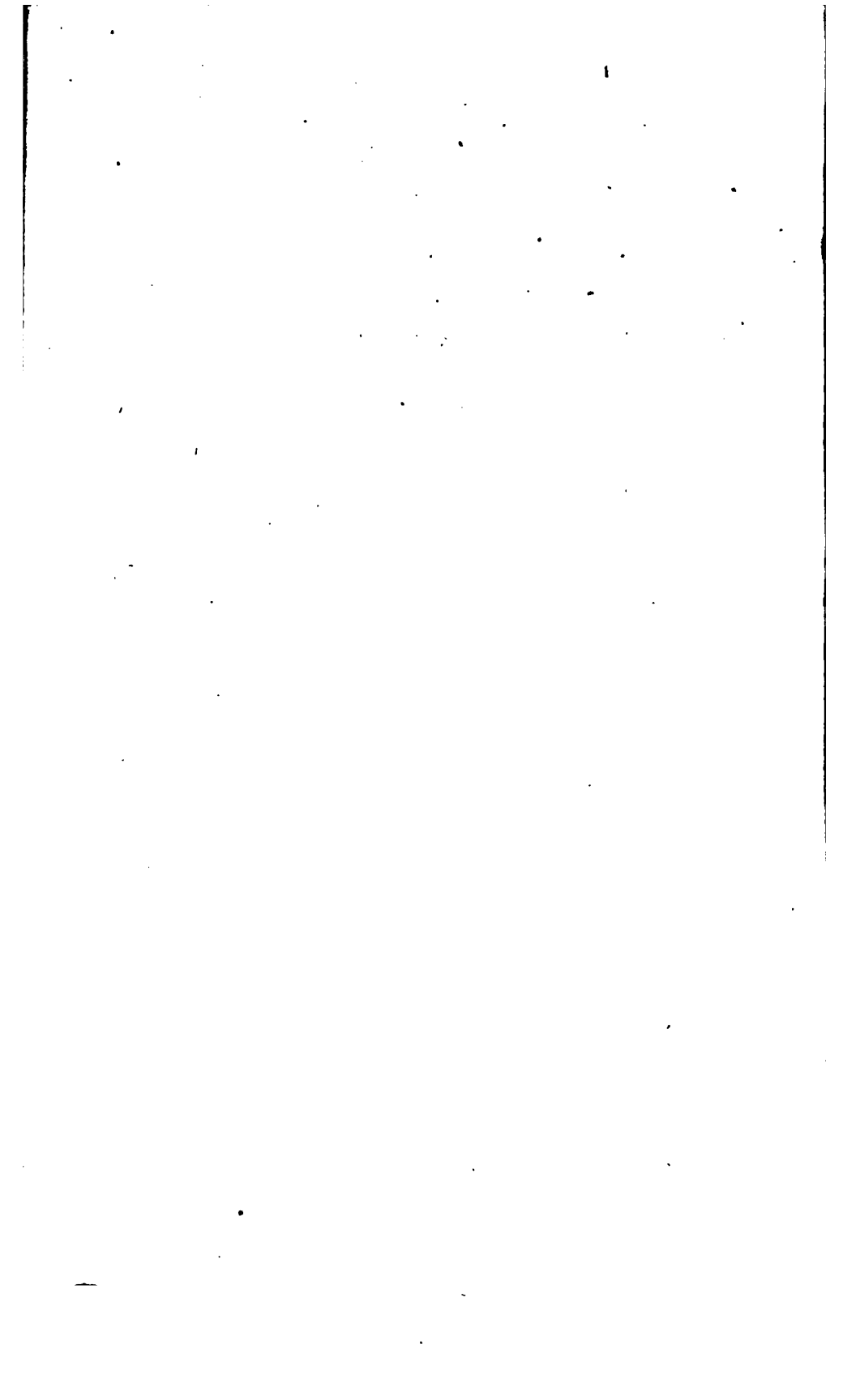
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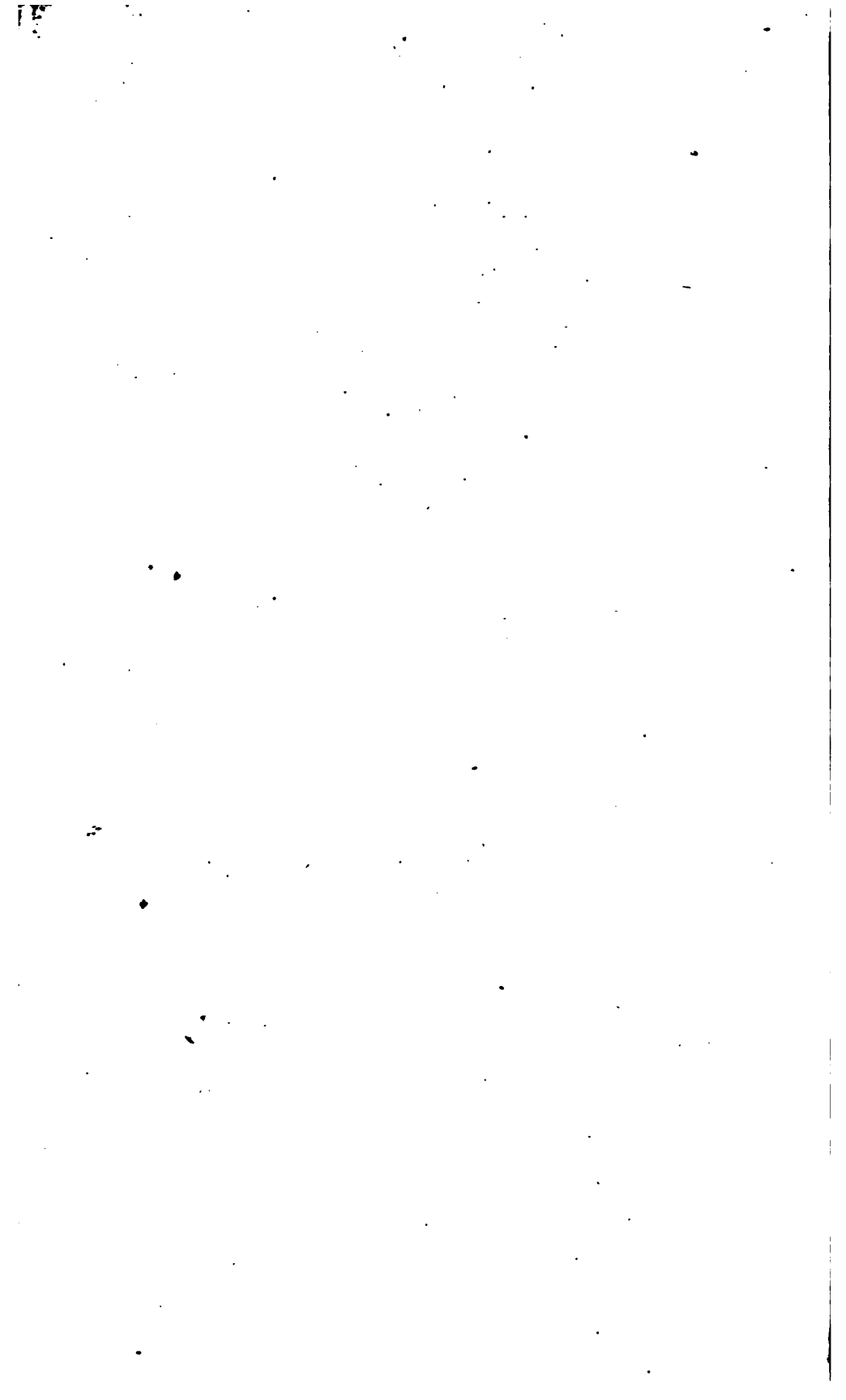
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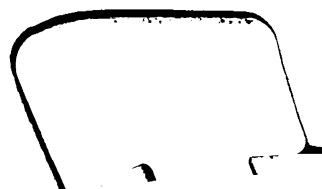














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